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Tribute to William F. Fratcher: Marital Property Rights in Transition

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Marital Property Rights in Transition*

Lawrence W. Waggoner**

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* This article is an updated and expanded version of the author's Joseph Trachtman Lecture delivered at the 1992 annual meeting of the American College of Trust and Estate Counsel on March 8, 1992. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, in 17 PROB. LAW. (1992). Portions of this article are drawn from LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: WILLS, TRUSTS, AND FUTURE INTERESTS (1991); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991); Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP., PROB. & TR. J. 683 (1992).

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"Marital property rights," a term that covers a vast multitude of rights or interests conferred by law on persons who occupy the status of spouse, are in a state of transition. To discuss the themes and trends that are emerging, this Article is divided into four discrete, yet related segments. The first segment addresses how the law allocates original ownership between spouses in a marriage. The second segment turns to the intestate share of the surviving spouse. This is not a topic that much concerns high-powered estate planners because intestate estates are usually fairly small. But to the surviving spouse, the intestate share can mark the difference between economic security and poverty. The third segment addresses the rights of spouses upon divorce and disinheritance at death. The fourth and final segment surveys some recent developments and offers a legislative proposal regarding the rights of persons who are not spouses at all, but "near-spouses."

Central parts of the Uniform Probate Code, as revised in 1990, affect spousal rights. This article reports on the UPC revisions regarding spousal rights. If nothing else, these revisions have already stirred a renewed interest in and debate about spousal rights, and are likely to continue to do so for years to come.

I. ALLOCATION OF ORIGINAL OWNERSHIP

Family property is like any resource, and spousal rights are just one characteristic of the allocation of those resources, albeit probably the most important one. In determining how ownership of family property is allocated and distributed, the law, for the most part, defers the distributive decision to the member of the family who is the so-called owner of the property. The law, in other words, appears merely to operate in this field as a facilitator rather than a direct regulator. When a dispute arises regarding the distribution of property, the law arbitrates the dispute by reference to the donor's intention. Hundreds of court opinions repeat the stock phrase "the donor's intention is the polestar of construction."

But the law's deference to the donor's intention somewhat disguises the truly important question of who is or can be the donor, or stated another way, who is the *owner* of the family property and hence the person with economic power within the family. Regarding original ownership (hence economic power) between spouses, it is the law, not the donor, that makes the crucial allocative decision. Although the law makes this allocative decision, the law throughout the world and, indeed, within the United States, is not uniform. In this country, two fundamentally divergent legal systems for allocating original ownership between spouses co-exist. I refer, of course, to the profound difference between the community property and separate property systems.

During an ongoing marriage, the basic principle in the separate-property states (also called common-law or title-based states) is that marital status does

not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage, regardless of how the property is nominally titled. By granting each spouse *upon acquisition* an immediate half interest in the earnings of the other, the community-property regimes directly recognize that spouses are partners rather than sole proprietors.

A. Historical Origins of Community and Separate Property Systems

The divergence between separate and community marital property ideas dates to the thirteenth century. The separate-property (title-based) system derives from English common law, while community property developed in continental Europe and was transplanted to the new world by French and Spanish settlers. The reasons for the divergence between the systems in England and continental nations remain somewhat obscure.¹ One plausible explanation is that, while England had all of the other ingredients that led to community property in France, it lacked any strong tradition of community within the family, at least one that extended beyond the nuclear family. Professor Donahue has argued: "Without any strong tradition of community, the English lawyers could not group these same [French] elements together and call it community. They lacked at an early stage the social practice around which the legal concept could crystallize and at a slightly later stage the legal concept around which the social practice could crystallize."²

There seems to be no doubt that the English system was male-dominated. Jeremy Bentham, the founder of Utilitarianism, wrote that "the stronger [referring to males] have had all the preferences. Why? Because the stronger have made the laws."³ Until the latter part of the nineteenth century, the husband became the owner of his wife's personalty upon marriage⁴ and had what was called a "tenancy by the marital right" in his wife's land.⁵ This

1. See Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 811-16.

2. Charles A. Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 86-87 (1979).

3. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 177-78 (C.K. Ogden ed., 1931).

4. See THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 42 (2d ed., 1953).

5. George L. Haskins, *Estates Arising from the Marriage Relationship and Their Characteristics*, in 1 AMERICAN LAW OF PROPERTY §§ 5.50-.55 (A. James Casner ed.,

gave the husband the right to the rents and profits from the land his wife owned at the time of their marriage or acquired during their marriage (until the birth of issue). Upon birth of issue, the husband's tenancy turned into the estate in curtesy. This system persisted in England and the United States until the latter part of the nineteenth century. The estate was abolished by legislation that came to be called the Married Women's Property Acts. These acts actually differed in detail, but their basic effect was to return the wife's property to her control, free from her husband's claims or control.⁶

B. Community versus Separate Property in this Country

In this country, eight states originally adopted the community-property system and the other states and the District of Columbia adopted the separate-property (common-law) system. What we have, then, is communal ownership in nearly twenty percent of the states, individual ownership in over eighty percent.

Reflect on how profoundly different these systems are. Community property reinforces a married spouse's sense of participation in the marriage and ownership of the marital estate. Separate property tends to place the nonpropertied spouse in a subordinate position. This split on so fundamental a question came about partly by historical accident. Community property was mostly adopted in the territories first settled by Spanish settlers. It "continues today chiefly in the states carved out of the former Spanish possessions."⁷ This explains why the eight original community-property states are located in the west and southwest.⁸ The separate property system, on the other hand, was adopted in the territories first settled by English settlers, the eastern states, and it spread westward from there.

Historical accident may also explain why the original community-property states adopted the community of acquests concept of the Spanish legal system. Under that concept, each spouse owns a half interest in the earnings of the

1952).

6. *Id.* at § 5.56.

7. Cornelius J. Moynihan, *Community Property*, in 2 AMERICAN LAW OF PROPERTY § 7.2 (A. James Casner ed., 1952).

8. The original community property states were Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. This is not to say that all these states adopted community law without debate, nor that all were once Spanish possessions. Six of the original states adopted the English common law, but at the same time or after several years, replaced the English system of dower and curtesy with community property. See W. S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES ch. 3 (1982); Wenig, *supra* note 1, at 818-21.

other acquired during the marriage, in effect as a tenant in common; property acquired prior to the marriage and property acquired during the marriage by gift, bequest, or inheritance are not counted in the community, and so remain separate property. The other community-property model, called universal community, has not appeared in this country. In universal-community systems, each spouse owns a half interest in all the property of the other, regardless of the property's source or time of acquisition.⁹

Interest in the community-of-acquests system over the years has not been limited to the original states, however. During the 1930s and 40s, before Congress allowed the joint income-tax return for married persons, several separate-property states converted to community property in order to grant their residents the tax benefits of community property's income-splitting effect. When the income-splitting joint return was adopted in 1948, these states converted back to the separate-property regime, which had the effect of conserving traditional gender roles and power relationships within the marriage.¹⁰

C. *The Uniform Marital Property Act*

More recently, interest in community property has been rekindled by a growing conviction in favor of economic equalization between husbands and wives. The idea that each marital partner should share equally acquests from the economic activity of the other led to the promulgation in 1983 of the Uniform Marital Property Act (UMPA). The UMPA adopts a version of the community of acquests, although the terminology used in the UMPA is different—community property is called "marital property," separate property is called "individual property."¹¹ Under the UMPA, as under community

9. Because both spouses own community property, problems arise concerning management of community assets. Community-property states have statutes prescribing who has power to manage and deal with the assets. These statutes vary considerably in their details, but some generalizations are possible. In Texas, the wife has sole management power over her earnings that are kept separate, and the husband has sole management power over his. If California and several other community-property states either spouse has power, acting alone, to manage community assets. Both spouses, however, ordinarily are required to join in transfers or mortgages of community real property. If one spouse makes a gift of community property to a third party, the nondonor spouse may set it aside entirely or in excess of a stated amount.

10. See Carolyn C. Jones, *Split-Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988); Wenig, *supra* note 1, at 821-24.

11. With respect to income earned on individual property UMPA follows the minority view and provides in § 4(d) that "income earned or accrued by a spouse or attributable to property of a spouse during marriage . . . is marital property."

property, each spouse acquires a present, vested ownership right in all the assets acquired by the economic activities of the other during the marriage; the right does not depend on surviving the other spouse. Wisconsin adopted a version of the UMPA in 1986,¹² and is now counted as the ninth community-property state.¹³

D. Allocation Rules are Default Rules

Even these rules of original ownership are default rules. They yield to a contrary intention. But the two systems are far from parallel in how a contrary intention must be formed. For spouses in community property states to decide to operate as sole proprietors, not financial partners, there must be *mutual* consent, in a premarital or marital agreement. For spouses in separate property states to operate as partners, the propertied spouse must decide to give ownership rights to the other spouse, by outright gifts or by putting his or her earnings into a joint checking or money market account, joint tenancies or tenancies by the entirety (which to varying degrees create property rights in the noncontributing spouse).

These rules, then, serve to reinforce the profoundly different symbolical and psychological feelings within the ongoing marriage. Spouses are partners by right in community property states. Spouses are partners, if at all, by the generosity or continued commitment to the marriage of the propertied spouse in separate property states.

I shall return to the partnership theory of marriage in Part III of this Article, when I focus on spousal rights upon dissolution of a marriage by divorce or disinheritance at death. Before that, however, I'd like to discuss spousal rights in intestacy.

II. SPOUSAL RIGHTS IN INTESTACY

Intestacy laws build upon the rules that allocate original ownership. Intestacy laws govern the distribution of property that the decedent "owns" at death. In the separate-property states, that means the property titled in the decedent's name. In the community-property states, that means the decedent's half of the community property and the decedent's separate property. Like the original-ownership rules, intestacy laws serve as default rules. The state's

12. WIS. STAT. ANN. §§ 766.001-766.979.

13. See Rev. Rul. 87-13, 1987-1 C.B. 20. For tax purposes, the implication of this ruling is that the basis in both halves of marital property is stepped up to its value at the date of the decedent's death under IRC § 1014(b)(6). If marital property had been treated for tax purposes as tenancy-in-common property, only the decedent's half would have received a step-up in basis.

intestacy pattern of distribution prevails unless the decedent has made a valid will.

A. The Shift from a Mandatory Rule to a Default Rule

Intestacy laws have not always served as default rules. To be sure, the power to dispose of personal property by will was recognized early. The ecclesiastical courts asserted jurisdiction over succession to personal property on death, and encouraged bequests for religious and charitable purposes, as well as for the decedent's family. During the Anglo-Saxon period, testamentary disposition of land was possible, but recognition ceased within about a century after the Norman Conquest. The devise of land by will "stood condemned," Maitland wrote, "because it is a death-bed gift, wrung from a man in his agony. In the interest of honesty, in the interest of the law state, a boundary must be maintained against ecclesiastical greed and the other-worldliness of dying men."¹⁴ The church courts never gained jurisdiction over succession to land and the Crown courts were not concerned with seeing that a man atoned for his wrongs by devoting a portion of his property to pious objects.

This all came to a head in the Sixteenth Century. By the English Statute of Wills of 1540,¹⁵ men (but not women) were granted the power to dispose of their land by will, in effect transforming intestacy from a rule of mandatory law into a default rule. It was not until the Nineteenth Century that power of testation was granted to women by the Married Women's Property Acts.¹⁶

B. Formulating Modern Intestacy Rules

How are or should modern intestacy rules be formulated, especially regarding the intestate share of the surviving spouse? In the last several years, the Joint Editorial Board for the Uniform Probate Code has had occasion to consider and debate that question. The result of that deliberation appears in

14. 2 FREDERICK POLLOCK & FREDERICK MAITLAND, HISTORY OF ENGLISH LAW 328 (2d ed. 1911).

15. 34 & 35 Hen. 8, c. 5, § 14.

16. For further discussion of the development of women's property rights in the United States, see NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986); E. WARBASE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861 (1987); RICHARD CHUSED, MARRIED WOMEN'S PROPERTY LAW, 1800-1850 (1983). See also SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND 1660-1833 (1990).

the revisions of the Uniform Probate Code, promulgated by the Uniform Law Commissioners in 1990.

That or any other consideration of spousal rights in intestacy must begin with the assumption that intestacy laws should reflect "common" intention. This is another way of underscoring the point that intestacy serves in default. No intestacy regime can hope to be "suitable" for every person who dies intestate. People whose individuated intention differs from common intention must assume the responsibility of making a will; otherwise, their property will be distributed, by default, according to common intention or, more accurately, according to intention as attributed to them by the state legislature.

C. Common Demographic Characteristics of Intestates and their Surviving Spouses

In considering what intention legislatures should attribute to decedents regarding their surviving spouses, we should first know something about the demographics of those who predominantly die intestate. As one might expect, decedents dying intestate tend to be older and their estates tend to be rather modest. Although younger people overwhelmingly do not have wills,¹⁷ and so the great majority of those dying young die intestate, they die in even lower numbers than you guess. As the chart,¹⁸ opposite, shows, only about 0.5% of the population (married and unmarried) die between ages 20 and 25, another 0.6% die between ages 25 and 30, and another 0.5% die between ages 30 and 35. That adds up to 1.6% dying between 20 and 35. Indeed, only another 0.7% die between ages 35 and 40, so that only 3.3% die in the two decades between ages 20 and 40. It is between ages 60 and 90 that we get serious about dying, for that is the period in which nearly three-fourths of the population die.¹⁹ Although most people age 65 and older have wills, the minority who die without wills make up a much larger number of people than the cohort of young people who die prematurely.

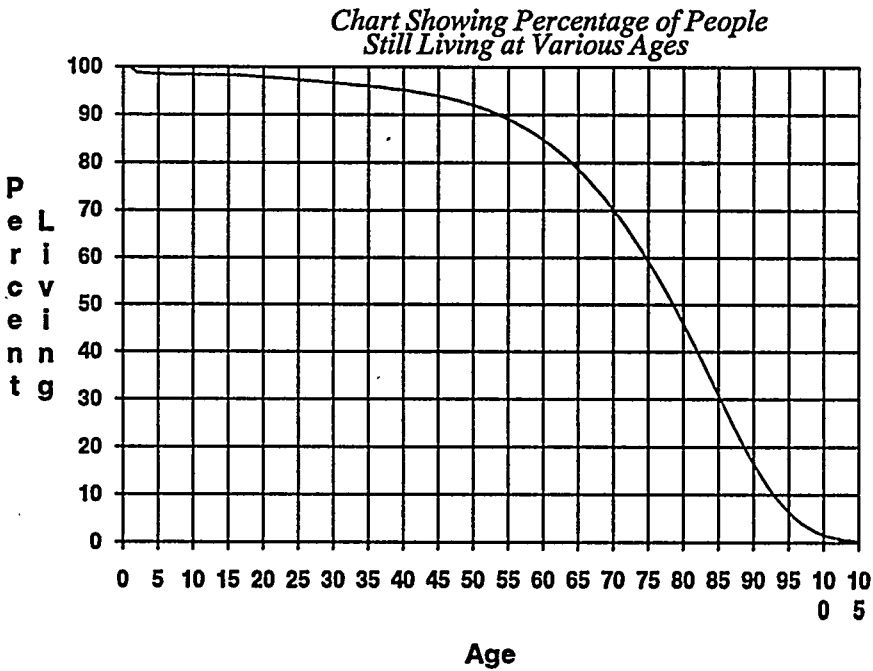
One study has found that, in terms of wealth, 72.3% of persons with estates valued between \$0 and \$99,999 do not have wills, 49.8% with estates

17. In telephone surveys conducted in five states in 1977, the following percentages of persons in each age category said they did not have a will: 87.7% age 17 to 30, 65.4% age 31 to 45, 39.3% age 46-54, 36.6% age 55 to 64, and 15.4% age 65 and over. See Mary Louise Fellows, et al., *Public Attitudes About Property Distribution at Death and Intestate succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 336-39.

18. The chart, opposite, and the figures in text, above, are based on Table 80CNSMT, in Fed. Est. & Gift Tax Rep. (CCH) ¶ 6415.301 (1989).

19. See *id.*

between \$100,000 and \$199,999 do not have wills, but only 15.4% with estates between \$200,000 and \$1 million do not have wills.²⁰



20. See Fellows et al., *supra* note 17. The estate figures have been adjusted for inflation. Between 1977, when the surveys were conducted, and 1992, when this Article was prepared, the consumer price index has about doubled. To reflect this increase in inflation, the figures reported in the original article have been doubled.

We can expect, therefore, that decedents dying intestate will typically be older than 60 and have an estate valued below \$200,000. What about the demographic characteristics of their surviving spouses? We know that they will likely be wives, not husbands, for wives tend to outlive their husbands.²¹ This is not only because women live longer than men,²² but also because wives tend to be, on average, nearly three years younger than their husbands.²³ As of March 1990, 73% of widows were 65 or older (8.4 million of 11.5 million) and 75% of widowers were 65 or older (1.8 million of 2.3 million).²⁴

What are the needs of these surviving spouses? They are, by and large, beyond working years. Only 13% of persons age 65 or older living alone or with nonrelatives reported income from earnings; these earnings accounted for only 10% of their incomes.²⁵ This forces them to rely to a great extent on capital-generated income,²⁶ which makes them vulnerable to the ebbs and

21. Of the 17.2 million women age 65 and older living in the United States as of March 1990, 49% (8.4 million) were widowed. Of the 12.3 million men age 65 and older, 15% (1.8 million) were widowed. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *SIXTY-FIVE PLUS IN AMERICA* tbl. 8-6, at 8-22 (1992). See also BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *POPULATION PROFILE OF THE UNITED STATES*, 22 (1991) ("For elderly men, the likelihood of being married declines only somewhat until age 85. In 1990, 78 percent of men 65 to 74 years ('young old') and 71 percent of men 75 to 84 ('aged') lived with their wives, but only 47 percent of men 85 years and over ('oldest old') did so. For elderly women, their likelihood of living with their husbands decreases sharply with age: 51 percent of young-old women, 28 percent of aged women, and only 10 percent of oldest-old women lived with their husbands in 1990.").

22. Average life expectancy is projected to be 79 years for women, 72 years for men. See U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1992, tbl. 103, at 76 (112th ed. 1992).

23. See *id.*, tbl. 130, at 91.

24. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *SIXTY-FIVE PLUS IN AMERICA* tbl. 8-6, at 8-22 (1992). The New York Times reported that married women of middle age, on average, will become widowed before turning 70 and will live fifteen more years. See Jon Nordheimer, *A New Abuse of Elderly: Theft by Kin and Friends*, N.Y. TIMES, Dec. 16, 1991, at A1, A12.

25. See SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT*, tbl. 3.E3 at 139 (1992). Only 8.9% of nondisabled widows reported receiving income from earnings. Categorized by age, 18.6% of nondisabled widows age 60-69 reported income from earnings and 3.4% of nondisabled widows age 70 or older reported income from earnings. See *id.*, tbl. 5.A12 at 185.

26. Sixty-five percent of persons age 65 or older living alone or with nonrelatives had income from dividends, interest, or rent; these income sources accounted for 22% of their incomes. See *id.*, tbl. 3.E3, at 139. Nearly 71% of nondisabled widows

flows of interest rates.²⁷ Apart from their social security payments²⁸ and perhaps a small pension,²⁹ the principal source of income for nonworking surviving spouses is the income they earn on their investments.³⁰ For elderly surviving spouses of less wealthy decedents, those who are most likely to die intestate, that means the interest they earn on their certificates of deposit.³¹ As of 1991, average social security payments barely exceeded the poverty level. The excess was only \$39 a month for nondisabled widows and widowers and only \$85 a month for retired workers.³² Contrary to the image

reported income from assets. Of those age 60-69, 65.6% reported income from assets and, of those age 70 or older, 73.4% reported income from assets. *See id.*, tbl. 5.A12 at 185.

27. *See, e.g., Robert Lewis, More Folks Feel Pinch*, 33 AMERICAN ASSOCIATION OF RETIRED PERSONS BULLETIN, March 1992, at 1, 12 ("[R]esearchers at Economic Analysis Associates in Stowe, Vt., estimate that for every percentage point drop in interest rates, investors 65 years and older lose \$15 billion of income. The loss for persons between 55 and 64 is calculated at \$4 billion."); John Liscio, *Exploding Some Popular Myths*, U.S. NEWS & WORLD REPORT, March 16, 1992, at 60 ("Economist Susan Stearne calculates that each 1 percentage point drop in [short-term interest] rates costs the over-55 set about \$19 billion in interest income . . ."); Larry Rohter, *Decline in Interest Rates Cuts Security of Retirees*, N.Y. TIMES, December 29, 1991, at A6 ("The dramatic decline of interest rates over the last 18 months has affected virtually all Americans. But economists agree that the elderly, many of whom live on fixed incomes, have been made especially vulnerable . . .").

28. Ninety-two percent of persons age 65 or older living alone or with nonrelatives reported receiving social security income; this source accounted for 44% of their incomes. SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT, tbl. 3.E3 at 139 (1992).

29. Forty percent of persons age 65 or older living alone or with nonrelatives had incomes from pensions, alimony, annuities, etc.; these sources accounted for 20% of their incomes. *See id.* Nearly 28% of nondisabled widows reported income from pensions. Categorized by age, 15.8% of nondisabled widows age 60-69 reported income from pensions and 24% of those age 70 or older reported income from pensions. *See id.*, tbl. 5.A12, at 185.

30. *See supra* notes 25-26, 28-29.

31. The Public Policy Institute of the American Association of Retired Persons reports that people 65 and over derive 17.5% of their income from interest-bearing accounts, compared to just 5.5% for those 45 through 64 and 3% for those under 45. *See Robert Lewis, More Folks Feel Pinch*, AMERICAN ASSOCIATION OF RETIRED PERSONS BULLETIN, March 1992, at 1, 12.

32. As of 1991, the average social security payments were \$6,996 per year or \$583 per month for nondisabled widows and widowers (\$428/month for widowers, \$584/month for widows) and \$7,548 per year or \$629 per month for retired workers (\$709/month for men, \$542/month for women). *See* SOCIAL SECURITY ADMINISTRA-

of the elderly as "fat cats living the good life at the expense of everybody else,"³³ government reports indicate that "twenty percent of all elderly widows were poor."³⁴ About forty percent of the elderly, in fact, are either poor or near-poor, "near-poor" being defined as having income no more than two times the poverty level.³⁵ A Florida study recently found that 31% of those 60 and over reported incomes of less than \$10,000 annually.³⁶

TION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT at 2, 193, 210 (1992).

For the same year, 1991, the poverty level for single persons age 65 and over was \$6,532 per year or \$544 per month. (For 1992, the poverty level rose to \$6,729 per year or \$561 per month.) See *id.* at 137. The government's "poverty index" is a very crude measure, however. It is based largely on outdated assumptions concerning consumption behavior. By one study, "if the consumption standards used to calculate the index were updated, it would raise aged poverty by at least 50 percent." James H. Schulz, "Poverty Level"—*Worn-Out Words to Hide the Truth*, 33 AMERICAN ASSOCIATION OF RETIRED PERSONS BULLETIN, March 1992, at 18. See also Robert Lewis, "These Are Not the Best of Times"—*Poverty On the Rise Among Elderly As Economy Drags*, 35 AMERICAN ASSOCIATION OF RETIRED PERSONS BULLETIN, Jan. 1994, at 7 ("Government economists say different poverty standards [for elderly and for younger persons] are justified because older persons have smaller households than younger families and lower expenses for such items as food, housing and commuting. Other analysis argue older Americans have higher costs for medical care and prescription drugs.").

33. Robert Lewis, *Ups and Downs of the 1980s: New Income Data Refutes [sic] "Fat Cat" Age Stereotype*, AMERICAN ASSOCIATION OF RETIRED PERSONS BULLETIN, Feb. 1992, at 1.

34. See U.S. DEP'T OF COMMERCE, POPULATION PROFILE OF THE UNITED STATES, 1989, at 41 (1989). As of 1991, 20% of women age 65 and older not living in a family were poor and 18.5% of similarly situated men were poor. See SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT 138 (1992).

35. Lewis, *supra* note 33, at 1. Defining "near-poor" as persons with incomes below 150% of the poverty level reduces the percentage of near-poor persons age 65 or over to 27.2%. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, SIXTY-FIVE PLUS IN AMERICA 4-12 (1992). See also Martha R. Burt, *Poverty Forces Elderly to Choose: Pay Bills or Eat*, AMERICAN ASSOCIATION OF RETIRED PERSONS BULLETIN, Jan. 1994, at 18 ("A new national survey by the Urban Institute, a Washington think tank, finds that in any six-month period almost 1.9 million seniors must choose between buying food and buying medicine, about 1.3 million must decide whether to buy food or pay rent or other bills, more than 1.1 million have whole days with no food in the house and no money to buy it and about 1.1 million older Americans skip meals because they have no food in the house.").

36. See Catherine Wilson, *Interest-Rate Plunge Chills Savers*, ANN ARBOR NEWS, Feb. 9, 1992, at C5, Col. 1. The nationwide statistics are similar. Of persons age 65 to 74 living alone in 1989, incomes below \$10,000 were reported by 33.8% of men

Given these demographic characteristics of intestates and their surviving spouses, I think we must next make certain basic assumptions about the marriage itself and the decedent's motives. Sound public policy, I believe, requires that we assume that the marriage is solid (that the partners remain devoted to one another) and that the decedent has what may be described as "just" motives. After all, the marriages we are talking about have ended in death, not divorce, and the decedent has made no effort to disinherit his or her surviving spouse. To assume that these marriages are other than solid would be to make a distinctly unfortunate cultural statement about the institution of marriage in American society. Included within the assumption that decedents have "just" motives are that decedents mean to be generous to their surviving spouses, mean to strike a fair balance between their surviving spouses and children (that is, to be fair to all), but, above all, in striking that fair balance, mean at the very least to provide economic security for their surviving spouses.³⁷ The link, of course, between need and intention is that need shapes intention—surviving spouses's need for economic security shapes decedents's intentions or, more accurately, shapes the intentions that the state should properly attribute to decedents.

D. Current Non-UPC Intestacy Laws are Typically Based on the English Approach of Granting a Fractional Share

How responsive are our current intestacy laws to these demographics and assumptions? They do not respond well in those states that still retain the pattern of intestacy transplanted from England. This is because the English antecedent determined the surviving spouse's share by *fraction*. Only in the larger intestate estates can a fractional share provide the surviving spouse with enough capital to generate an adequate stream of income. In the smaller intestate estates, such as in a \$30,000 intestate estate, a fractional share of one-half gives the surviving spouse only \$15,000. The full \$30,000 would be insufficient, but the intestacy laws cannot manufacture larger estates for people. The most they can do is give the full \$30,000 to the surviving spouse.

The English Statute of Distribution of 1670, which governed the intestate distribution of personal property, did not even give a one-half share. The

and 47.8% of women. Of those age 75 and over, incomes below \$10,000 were reported by 41.9% of men and 58% of women. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, SIXTY-FIVE PLUS IN AMERICA 4-10 (1992).

37. Obviously, not all marriages are ideal and not all decedents have "just" motives. But these assumptions are not unfair to people whose marriages or motives fall outside the mold. Decedents whose marriages are less than ideal must be expected to understand that their situation calls for individuated action. They must make their own wills (or get divorced).

share provided the decedent's widow in that statute was one-third; the remaining two-thirds was divided among the decedent's children or their issue by representation. Only if there were no children or issue was the widow's share increased to one-half; the other half went to the decedent's ancestors and collateral relatives. Under no circumstances did the widow have a right to her husband's entire estate. The statute did not bother to provide for a surviving husband's share because, as noted earlier, the wife's personalty became her husband's upon marriage.

The descent of land followed a similar pattern of fractional shares for widows. Although surviving spouses received no share at all under the canons of descent, they were provided for by the estates of dower and curtesy. Dower gave each widow a life estate in one-third of her deceased husband's land. Curtesy gave each widower a life estate in all of his deceased wife's land.

For the most part, the non-UPC intestacy laws of this country follow a similar pattern. If the decedent is survived by children (or descendants of deceased children), the spouse's share will likely be one-third, with the remaining two-thirds going to the decedent's descendants.³⁸ This is so even when some or all of them are minors, in which case any portion the minors inherit must be placed in a normally cumbersome and expensive guardianship form of ownership. More importantly, it is also so even when some or all of them are able-bodied adults with adequate means of support, in which case the surviving spouse is the more typical surviving spouse who is elderly and dependent on capital for income. If the decedent is not survived by children (or descendants of deceased children), but is survived by one or both parents, the spouse's share will likely be one-half, with the other half going to the decedent's parent or parents, even though the parents may be financially self-sufficient.³⁹ Only if the decedent leaves no surviving descendants or parents does the surviving spouse commonly inherit the entire intestate estate.

38. Other variations exist. Some non-UPC statutes provide for a 50/50 split between the surviving spouse and the descendants. Others provide the spouse a one-half share if there is one descendant but a one-third share if there is more than one descendant, the remaining half or two-thirds going to the descendants. Still others provide a variety of unique patterns of division between the spouse and descendants. Normally, no distinction is drawn between decedent's descendants who are also descendants of the spouse and those descendants who are not also the spouse's descendants. For a compilation of the various statutory patterns as of 1978, see Fellows et al., *supra* note 17, at 357 n.128.

39. Other variations exist. In a few states, the spouse must share the estate with the decedent's siblings if both parents have predeceased. Others have unique systems for allocating the estate between the spouse and parents. Some non-UPC law gives the entire estate to the surviving spouse and nothing to the decedent's parents. See *id.* at 348-50.

E. The Uniform Probate Code

As originally promulgated in 1969, the Uniform Probate Code (pre-1990 UPC) continued the common practice of granting the decedent's surviving spouse the entire intestate estate when the decedent left neither surviving issue nor surviving parents. But the pre-1990 UPC made a significant and ingenious departure from the fractional-share approach commonly applied to cases in which there were surviving issue or a surviving parent. Here, the pre-1990 UPC used a lump-sum-plus-a-fraction approach.⁴⁰ The genius of the lump-sum-plus-a-fraction approach is that it gives the surviving spouse first claim to a certain amount of capital. If the estate is large enough to discharge that responsibility and have assets to spare, then dividing the remaining part of the estate between the spouse and the issue or parents does not jeopardize the spouse's economic security. In the pre-1990 Code, when the cost of living was less than a third of what it is today, the lump sum granted off the top was \$50,000.⁴¹ Only to the extent the estate exceeded that minimum figure of \$50,000 (over \$150,000 in today's dollars) would the balance be split between the spouse and children or parents. In a \$100,000 estate, for example, the spouse's share was \$75,000, with \$25,000 going to the decedent's descendants or parents. In a \$150,000 estate, the spouse took \$100,000, with \$50,000 going to the descendants or parents.

Studies before and after 1969 suggest that the pre-1990 Code may not have gone far enough. These empirical studies have identified a strong social preference for giving the entire estate to the surviving spouse, even when the decedent has surviving children or parents. Some of these studies were based on an examination of the probated wills of similarly situated decedents who died during a particular time frame in a particular locality.⁴² Other studies

40. The framers of the pre-1990 UPC did not invent the lump-sum-plus-a-fraction approach. That approach appeared in § 22 of the Model Probate Code.

41. Some states adopting a lump-sum-plus-a-fraction approach have used a different figure, ranging from a low of \$20,000 in Florida and Missouri to a high of \$100,000 in Alabama.

42. See, e.g., M. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 86-87, 89-90, 143-45 (1970) (for those testators survived by spouse and lineal kin, 85.8% of the decedent testators (N=226) and 85.3% of the testators (N=367) in the survivor population provided that the spouse receive the entire estate; in 33 of 37 cases where the testator was not survived by lineal descendants or ascendants but was survived by a spouse, the spouse received the entire estate); Olin L. Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1307-09 (1969) (26 of the 54 testators left their entire estates to their spouse and not to their issue; of those 18 testators who distributed the estate to both spouse and issue, six designed their wills to give the spouse only that amount equal to the maximum marital deduction available for federal estate tax purposes at that time; in 9 of the 13 instances

were based on interviews with living persons.⁴³

The message of these studies seems clear: The typical decedent with children sees the surviving spouse in a dual role—first and foremost as the decedent's primary beneficiary, but also as a conduit through which to benefit their children. If the decedent dies prematurely, at a time when the couple's children are still minors, the surviving spouse is seen as better positioned to use the decedent's property for the benefit of their children, as well as for himself or herself. For decedents who live well beyond the minority of their children, as most do, the surviving spouse will likely be older and have greater economic needs than their children. By then the children are probably middle-aged, working adults whose support comes from labor-generated income, as opposed to the surviving spouse, who is likely to be dependent on capital-generated income to lift him or her above the poverty level. That does not mean, however, that the conduit theory does not operate for adult children. The adult children stand to inherit any unconsumed portion of the decedent's property at the surviving spouse's death.

These studies, along with other evidence,⁴⁴ led the Joint Editorial Board

in which the testator was survived by a spouse and no children, the testator gave the spouse the entire estate); Allison Dunham, *The Method, Process and Frequency of Wealth Transmissions at Death*, 30 U. CHI. L. REV. 241, 252-53 (1963) (in the 22 testate estates where the deceased was survived by spouse and children, 100% left all of the property to the spouse; in all but one of the six cases in which the testator was survived by a spouse but no children, the testator gave the spouse all of the property).

43. Fellows et al., *supra* note 17, at 351-54, 358-64, 366-68 (found the majority favored granting entire estate to the spouse regardless of the level of wealth involved); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and [Pre-1990] Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1089 (1978) (found the percentage who favored granting the entire estate to the spouse decreased as the level of wealth increased); U.K. LAW COMM'N, REPORT ON FAMILY LAW: DISTRIBUTION ON INTESTACY, 1989, No. 187, app. C, at 36-37, 40-45 (well over 70 percent of the respondents favored the spouse receiving the entire estate regardless of whether the decedent was also survived by minor children, adult children, or siblings).

44. The move to have the spouse inherit the entire estate is aligned with trends in intestacy laws throughout the U.S. and Europe. A recent report of the U.K. Law Commission recommended granting the surviving spouse the entire intestate estate in all circumstances. See U.K. LAW COMM'N, *supra* note 43, at 8-12. In her recent book, Mary Ann Glendon has identified this trend, which she calls the "shrinking circle of heirs" phenomenon. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 238 (1989). By this she means that, over time, throughout the U.S. and Europe, "the position of the surviving spouse has steadily improved everywhere at the expense of the decedent's blood relatives." *Id.* She goes on to point out that this trend "strikingly illustrate[s] the movement of modern marriage into the foreground of family relationships." *Id.* at 239. It recognizes "the gradual attenuation of legal bonds

to make substantial changes in the spouse's share in the 1990 Code. The 1990 Code continues the pattern of giving the surviving spouse the entire estate when the decedent is not survived by descendants or parents. It goes further, however, and provides that the surviving spouse also receives the entire estate when the decedent is survived by descendants, as long as those descendants are also the descendants of the surviving spouse and the surviving spouse has no descendants who are not the decedent's.

Marriages with step-children—sometimes called "blended families"—are another matter. With divorce and remarriage a common event in today's society, many married couples will end up having children from prior marriages on one or both sides. By introducing divided loyalties, the existence of step-children weakens the conduit theory. A statute that gives the entire estate to the surviving spouse of a decedent who leaves children from a prior marriage puts those children at the risk of permanent "loss" of inheritance. Similarly, a statute that gives the entire estate to the surviving spouse who has children from a prior marriage puts the decedent's children at risk of partial loss of inheritance.⁴⁵ Thus, the dilemma in the stepparent situations becomes one of striking a reasonable balance between the needs of the surviving spouse and the inheritance expectations of the decedent's children.

The pre-1990 Code sought to address the question of step-relationships. Under the pre-1990 Code, the surviving spouse of a decedent who had children from a prior marriage did not receive a lump-sum-plus-a-fraction. The pre-1990 Code reverted to the straight fractional-share approach in that situation. The pre-1990 Code provided for a 50/50 split of the decedent's property between the decedent's spouse and descendants. The problem with this approach is that it sacrifices the surviving spouse's economic security in the smaller to modest estates in order to preserve inheritance expectations of adult children who, unlike the surviving spouse, are in the labor market and not forced to rely for subsistence on capital-generated income. Remember also that the fact that the decedent has children from a prior marriage does not necessarily mean that the decedent did not have any joint children with the second and surviving spouse. Nor does it necessarily mean that the decedent's

among family members outside the conjugal unit of husband, wife, and children," and "[t]he tendency to view a marriage that lasts until death as a union of the economic interests of the spouses" *Id.* at 238, 240.

45. The same moral conflict will arise after the decedent's death if the surviving spouse remarries and has children by his or her new spouse. For intestacy law, however, this possibility must be disregarded. As currently constituted, intestacy law requires the decision regarding how much to award the surviving spouse to be made on the basis of the facts existing at the decedent's death.

second marriage was a short-term, late-in-life marriage.⁴⁶ The decedent's second marriage could, in fact, be his or her main marriage in life.

The 1990 revisions address the step-children dilemma differently. The 1990 revisions invoke the lump-sum-plus-a-fraction device for these situations also. The intent is to grant a share that is commensurate with the size of the estate and the circumstances of the family make-up. In the typical intestate estate of small to modest size, this approach would give the surviving spouse the entire estate.⁴⁷ In allocating scarce resources such as these, granting economic security to the surviving spouse appears more important than satisfying the inheritance expectations of the decedent's adult children.

In the larger intestate estates, in contrast, the UPC approach is predicated on the notion that the decedent would feel that some provision for his or her children would not deprive the surviving spouse of economic security.⁴⁸ For larger estates, the lump-sum-plus-a-fraction device assures that the decedent's children receive an inheritance.

The 1990 Code draws a distinction between cases in which only the

46. Even if it was, the decedent's surviving spouse may deserve this amount as rough compensation for having taken care of the decedent in his or her dying years. For every person receiving long-term care in a nursing home, another 2 people living in the community have long-term care needs. Seventy to eighty percent of these people are cared for by their families at home. See *TEACHERS INSURANCE AND ANNUITY ASS'N, LONG-TERM CARE* 2, 11 (1992).

47. A factor that makes this even more likely is that, under the UPC scheme, the intestate share is in addition to the probate exemptions and allowances, which run mostly in favor of the surviving spouse. Specifically, § 2-402 gives the surviving spouse a homestead allowance of \$15,000; § 2-403 gives the surviving spouse an exempt property allowance up to \$10,000 in household furniture, automobiles, furnishings, appliances, and personal effects (non-liquid assets and therefore not available to generate income); and §§ 2-404 & -405 authorize the personal representative to determine a family allowance up to \$1,500/month for one year (\$18,000) without court authority. The family allowance does not necessarily go exclusively to the surviving spouse, however. If the decedent left minor or dependent children who are not living with the surviving spouse, the allowance may go partly to or for the benefit of those children and partly to the surviving spouse. If the decedent left children by a prior marriage who are adults, and if the surviving spouse has ample resources (including life-insurance proceeds etc. from the decedent by way of will substitute), the personal representative can take those resources into account and determine a family allowance of a lesser amount and if the personal representative does not determine a lesser amount, the children can challenge the personal representative's decision.

48. Economic security for the surviving spouse would be further enhanced in estates in which the decedent has created will substitutes providing for the spouse, such as joint tenancies, joint checking, savings, or money-market accounts, life-insurance contracts, and pension plan arrangements.

surviving spouse has children from a prior marriage and cases in which the decedent has children from a prior marriage. In the former case, the surviving spouse is granted the first \$150,000 plus 50% of any remaining balance. In the latter case, the surviving spouse is granted the first \$100,000 plus 50% of any remaining balance.

Lest granting the surviving spouse a minimum claim on the first \$100,000 or more appears over-generous, and hence unfair to the decedent's children by the prior marriage, consider that at today's "CD" interest rates of around 3.5%,⁴⁹ \$100,000 generates only \$292 a month (\$3,500 a year) in income. With average social security payments added in, the surviving spouse's income only rises to \$875 a month (\$10,500 a year), which is a mere \$331 a month (\$3,968 a year) above the poverty level. This still puts the surviving spouse into the category of the near-poor (defined as persons with incomes less than twice the poverty level). Even if short-term interest rates return to the 8% level of a few years ago, the income yield rises only \$375 a month (\$4,500 a year). A surviving spouse who only has social security and \$100,000 in assets will still be in jeopardy of outliving those assets, especially if he or she lives into deep old age, as so many now do. To the extent that the interest plus social security proves insufficient, capital will need to be drawn down, perhaps to the point of exhaustion or near exhaustion.⁵⁰ With high real estate taxes and high costs of prescription drugs and other medical procedures not covered by Medicare, not to mention nursing home expenses should that become necessary,⁵¹ the cost of living for the elderly often rises

49. At the close of 1993, interest rates averaged 2.79% on 6-month CD's, 3.08% on 1-year CD's, 3.65% on 2 1/2-year CD's, and 4.65% on 5-year CD's. See N.Y. TIMES, January 2, 1994, § 3, at 15.

50. We are currently experiencing a general inflation rate of 2 to 3%. (For 1993, the consumer price index rose 2.7%. N.Y. TIMES, January 14, 1994, at C2.) If \$100,000 is invested in "CDs" yielding 4% interest, and if \$10,000 is withdrawn each year (adjusted upward for a 2% inflation rate in Year 2 and beyond), \$100,000 will only last 11 years. If the same annual withdrawal is adjusted upward for a 3% inflation rate, \$100,000 will only last 10 years. Reducing annual withdrawals to, say, \$7,000 extends the period to 17 years at a 2% inflation rate and to 15 years at a 3% inflation rate. See JANE BRYANT QUINN, MAKING THE MOST OF YOUR MONEY 893-94 (1991) (tables).

51. Two out of 5 people over 65 will spend some time in a nursing home during their lifetimes. Nearly 75% of all nursing home residents are women. Costs range from \$20,000 to \$80,000 per year; 36% of these costs are currently borne by Medicaid. See TEACHERS INSURANCE AND ANNUITY ASS'N, LONG-TERM CARE 2, 11 (1992). Note that the more the intestacy laws reduce the surviving spouse's share in order to favor adult children by a prior marriage, the more likely it becomes that state funds will have to be expended under Medicaid for nursing home care of the surviving spouse. This point alone should make state legislators more sympathetic to the UPC's

faster than the general inflation rate.⁵²

These computations assume that the surviving spouse receives as much as \$100,000 in cash that can be invested in "CDs." In fact, some of the decedent's estate will probably be distributed in kind, that is, in the form of specific assets that are illiquid, thus decreasing the income-generating potential of the spouse's share.

Of course, some surviving spouses need not depend on a share of the decedent's intestate estate for economic security. Some already have independent means or will benefit from will substitutes such as life insurance, pension death benefits or annuities, joint tenancies, or joint banking or money market accounts. Because intestacy laws, by tradition, are kept simple, however, the spouse's share is not offset by the amount of the spouse's assets. Unless this constraint on the intestacy laws is to be broken, it necessitates designing those laws on the assumption that the surviving spouse does not have independent means and will not benefit appreciably from will substitutes. This approach is the only way to guarantee all surviving spouses a minimum degree of economic security. It does require, not unfairly, it seems to me, the decedent whose spouse has economic security to make a will in favor of his or her children from the prior marriage, if that is what the decedent thinks is appropriate.

III. SPOUSAL RIGHTS UPON DIVORCE AND AGAINST DISINHERITANCE

Suppose the decedent does make a will that gives little or nothing to his or her surviving spouse. In the United States,⁵³ the decedent's spouse is the

lump-sum-plus-a-fraction approach than to the inheritance expectations of the decedent's adult children by a prior marriage.

52. Because the lump-sum dollar figures in the 1990 UPC can themselves become quickly out of date due to inflation, the Joint Editorial Board for the Uniform Probate Code recently approved a new section that provides a cost-of-living adjustment for these the dollar figures. Although this new section has not yet been submitted to the Uniform Law Conference for promulgation as an official part of the UPC, the text of the section is given in Appendix A of this article, *infra*.

53. In contrast, in the western European nations, a decedent cannot totally disinherit his or her children and sometimes cannot totally disinherit other blood relatives. In England and the principal commonwealth jurisdictions (the Australian states, most of the Canadian provinces, New Zealand), the statutory scheme known as Testator's Family Maintenance (TFM) is in place, by which the chancery judge is empowered to revise the dispositive provisions of a testator's will (including intestate shares, in an intestate estate) for the benefit of the decedent's relatives and other dependents.

only relative who is protected against intentional disinheritance.⁵⁴ Like the question of allocating original ownership, disinheritance of a surviving spouse brings into question the fundamental nature of the economic rights of each spouse in a marital relationship, of how society views the institution of marriage. As noted earlier, the contemporary view of marriage is that it is a partnership, and that the financial component of marriage is one of profit-sharing under the theory of economic partnership.⁵⁵

54. The decedent's children and possibly more remote descendants are granted protection only against unintentional disinheritance.

55. One of the earliest American expressions of the partnership theory of marriage appears in the 1963 Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women. As quoted in the Prefatory Note to the Uniform Marital Property Act, the Report states:

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind.

The strength of the attribution to marriage of an economic partnership is evidenced by the recent New Jersey case of *Carr v. Carr*, 576 A.2d 872 (N.J. 1990). In that case, a husband, after having left his wife of seventeen years, died during the pendency of a divorce proceeding initiated by the wife. The husband's will devised his entire estate to his children by a former marriage. The court held that the husband's death terminated the divorce proceeding under which the wife would have been entitled to a share determined under New Jersey's equitable-distribution statute. The wife also had no recourse under New Jersey's elective-share statute because that statute withheld an elective share from a surviving spouse if the decedent and spouse were not living together at the time of the decedent's death. Despite the wife's inability to recover under either the divorce or elective-share statute, the court held:

We conclude . . . that the principle that animates both [the equitable-distribution and elective-share] statutes is that a spouse may acquire an interest in marital property by virtue of the mutuality of efforts during marriage that contribute to the creation, acquisition, and preservation of such property. This principle, primarily equitable in nature, is derived from notions of fairness, common decency, and good faith. Further, we are convinced that these laws do not reflect a legislative intent to extinguish the property entitlement of a spouse who finds himself or herself beyond the reach of either statute because the marriage has realistically but not legally ended at the time of the other's death.

In the exercise of their common-law jurisdiction, courts should seek to effectuate sound public policy and mold the law to embody the societal values that are exemplified by such public policy. . . .

A. *The Partnership Theory of Marriage*⁵⁶

The partnership theory of marriage, sometimes called the marital-sharing theory, is variously stated and supported. Sometimes it is portrayed "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike."⁵⁷ Under this approach, the economic rights of each spouse are seen as deriving from an unspoken or imputed marital bargain under which the partners agree that each is to enjoy a half interest in the economic production of the marriage, that is, in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is visualized in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost."⁵⁸ Sometimes the theory is stated in aspirational and behavior-shaping terms:

The constructive trust, we believe, is an appropriate equitable remedy in this type of case . . . [that] should be invoked and imposed on the marital property under the control of the executor of [the husband's] estate . . . to avoid the unjust enrichment that would occur if the marital property devolving to [the husband's] estate included the share beneficially belonging to [the wife].

In a footnote, the court noted that efforts were currently pending in the New Jersey legislature to correct the problem of a surviving spouse who falls outside the protection of both statutes.

56. In the late Eighteenth Century, Jeremy Bentham sought, unsuccessfully, to reform the English common-law system by writing a model law of succession. Some of his ideas seem to reflect a conception of marriage as a partnership. He wrote:

Article I. No distinction between the sexes; what is said of one extends to the other. The portion of the one shall be always equal to that of the other. Reason.— Good of *equality*. . . .

Article II. After the husband's death, the widow shall retain half the *common* property; unless some different arrangement was made by the marriage contract.

J. BENTHAM, *supra* note 3, at 178-79 (Emphasis added).

57. GLENDON, *supra* note 44, at 131.

58. *Id.*

[T]he ideal to which marriage aspires [is] that of equal partnerships between spouses who share resources, responsibilities, and risks. . . .

From a policy standpoint, this partnership framework is desirable both because it encourages cooperative commitments between spouses and because it serves broader egalitarian and caretaking objectives. In effect, sharing principles hold promise for bridging traditional public/private divisions between family and market. A partnership model can cushion the impact of persistent gender biases in couples' private allocation of home-making tasks and in the public allocation of salaries and benefits. By sharing their total resources, families can spread the risks and benefits of sex-linked roles, the remnants of a socioeconomic system that makes it difficult for any one individual to accommodate a full work and family life. . . .

Not only do partnership principles promote gender equality; they also support caretaking commitments toward children and elderly dependents.⁵⁹

Part I of this Article was devoted to a description of the rules that allocate original ownership of property in a marriage. The fundamental divergence between the community-property and separate-property systems reveals that the community property system implements the partnership theory while the separate-property system does not.

*B. Equitable Distribution Upon Divorce*⁶⁰

The community-property system directly treats a couple's enterprise as collaborative, by granting each spouse a one-half interest in the earnings of the other immediately upon acquisition. Today, all or nearly all⁶¹ of the separate-property states also give effect, or purport to give effect, to the

59. Rhode & Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 198-99 (Stephen D. Sugarman & Herma Hill Kay, eds., 1990).

60. For a collection of excellent essays on divorce-reform laws, see *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay, eds., 1990).

61. In 1989, Professor Oldham reported that "Mississippi is the only state that has not clearly accepted [the equitable-distribution] system. See *Jones v. Jones*, 532 So.2d 574 (Miss. 1988)." J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 *FAM. L.Q.* 219, 219 n.1 (1989).

For a fascinating account of how this system swept the country, see Mary Ann Glendon, *Property Rights Upon Dissolution of Marriages and Informal Unions*, in *THE CAMBRIDGE LECTURES* 245 (N. Eastham & B. Krivy eds., 1981).

partnership theory at dissolution of a marriage upon divorce.⁶² Under so-called equitable distribution statutes, courts are given broad discretion "to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce."⁶³

The equitable distribution scheme was first introduced by the Uniform Marriage and Divorce Act (UMDA). As originally promulgated in 1970, the UMDA required that "marital" property be distinguished from "nonmarital," or "separate" property. Only the former was subject to division at divorce. This distinction, which was drawn from community-property law and generally corresponds to community and separate property, created various characterization problems. For example, are increases in value of admittedly nonmarital property during marriage marital or nonmarital? The statute's approach to characterization was similar to that in a community of acquests regime: a presumption that all assets acquired by either spouse during

62. In *Rothman v. Rothman*, 320 A.2d 496 (N.J. 1974), a landmark case interpreting New Jersey's equitable-distribution statute, the New Jersey Supreme Court stated:

The statute we are considering authorizes the courts, upon divorce, to divide marital assets equitably between the spouses. . . . [T]he enactment seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute. . . . The widely pervasive effect this remedial legislation will almost certainly have throughout our society betokens its great significance.

Id. at 501-02. Although in this early equitable-distribution case, the court refused to establish a presumptive division of marital assets on a 50/50 basis, *see id.* at 503 n.6, many courts today do indulge in such a presumption of equal division, and many of the more recently enacted statutes explicitly do so also. *See* J. GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION* ¶ 8.03 (1989).

63. Gregory, *supra* note 62, ¶ 1.03 at 1-6.

marriage are marital. Several exceptions to this presumption existed: (1) assets that either spouse brought to the marriage, including assets that can be traced back to such assets; (2) assets that either spouse acquired during marriage other than from earnings; and (3) assets that both spouses agreed to exclude from division upon dissolution of their marriage.

In response to characterization problems brought about by the marital/nonmarital assets dichotomy, the UMDA was subsequently amended to abolish that distinction. The UMDA now describes the property subject to division as "property and assets belonging to either [spouse] or both however and whenever acquired. . . ."⁶⁴ This provision creates what is called a "hotchpot" property scheme. This change eliminates the characterization problem, but it makes the question how the property should be divided more difficult.⁶⁵

Among the states that have not adopted the UMDA, there are considerable differences in the statutes concerning what property is subject to division.⁶⁶ Once the court has determined what property is divisible, however, it has power to order the title-holding spouse to transfer all or a part of divisible assets to the other spouse. The statutes differ regarding the criteria by which courts are to make distributive decisions, but, in general, equitable distribution is characterized by a considerable degree of judicial discretion. This feature marks an important difference between the equitable-distribution and community-property regimes. Despite this difference, however, equitable distribution approximates community property at divorce by implementing the partnership theory.⁶⁷ The widespread adoption of equitable-distribution statutes is a source of pressure on separate-property states to implement the partnership theory in the other circumstances in which spousal property rights become crucial—disinheritance at death.

64. UMDA § 307 (1973).

65. See Robert J. Levy, *An Introduction to Divorce — Property Issues*, 23 FAM. L.Q. 147, 151-56, 159-61 (1989).

66. The various schemes are canvassed, state-by-state, in J. GREGORY, *supra* note 56; J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* (1989); and L. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* (1983).

67. See Elizabeth A. Cheadle, Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269 (1981).

C. Protection Against Disinheritance

1. Conventional Elective-Share Law

All but one of the separate-property states⁶⁸ curtail the decedent's testamentary freedom in order to protect the surviving spouse against disinheritance.⁶⁹ No matter what the decedent's intent, the separate-property states recognize that the surviving spouse has a claim to some portion of the decedent's estate. These statutes, which in all but a few states have replaced the common-law estates of dower and curtesy,⁷⁰ provide the spouse a so-called "forced" share. Because the forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent's estate, and not as a retitling of the decedent's property that automatically occurs at death, the more descriptive term "elective" share is often used.

Elective-share law in the separate-property states has not caught up to the partnership theory of marriage. Under typical American elective-share law, including the elective share provided by the pre-1990 UPC, a surviving spouse is granted a right to claim a one-third share of the decedent's estate, not a right to claim the fifty percent share of the couple's combined assets that the partnership theory would imply.

68. Georgia is the only separate-property state lacking an elective-share statute. For a discussion of the reasons for Georgia's position, including its unusual "year's support" practice, and an argument that elective-share statutes are generally unnecessary, see Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447 (1976). For an opposing view, see Peter H. Scott, Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427 (1985).

69. A unique feature of community-property regimes is that a decedent's surviving spouse is not seen as needing "protection" against disinheritance by means of a so-called "elective" share in the estate of the deceased spouse. The survivor already owns a half interest in the fruits of the marriage. No elective share is provided with respect to the separate or individual property of the other spouse because that property was not attributable to the fruits of the marriage. Contribution having been rewarded, the decedent can be allowed unfettered power of disposition over her or his separate or individual property and over her or his half of the community or marital property.

70. The Restatement of Property lists five jurisdictions as providing the surviving spouse a dower or dower-like interest in the decedent's real property—Arkansas, District of Columbia, Kentucky, Ohio, and West Virginia. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 34.1 stat. note (1992). Dower, however, was abolished in West Virginia in 1992 incident to enactment of the UPC's accrual-type elective share, as described *infra* text accompanying note 76.

To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. In such a marriage, the elective-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result is governed by which spouse happens to die first and by how the property accumulated during the marriage was nominally titled. To illustrate this point, consider Harry and Wilma. Assume that they were married in their twenties or early thirties. They never divorced, and Harry died somewhat prematurely at age, say, 62, survived by Wilma. For whatever reason, Harry left a will entirely disinheriting Wilma. Throughout their long marriage, the couple managed to accumulate assets worth \$600,000, marking them as a somewhat affluent but hardly wealthy couple. Under conventional elective-share law, Wilma's ultimate entitlement is governed by the manner in which these \$600,000 in assets were nominally titled as between them. Wilma could end up significantly better off or significantly less well off than the \$300,000 share that the 50/50 partnership principle would suggest. The reason is that conventional elective-share law grants Wilma a claim to one-third of Harry's "estate."

When the marital assets have been disproportionately titled in the decedent's name, as is typical in a traditional support marriage in which the husband dies first, conventional elective-share law often entitles the survivor to less than an equal share. Thus, if Harry "owned" all \$600,000 of the marital assets, Wilma's claim against Harry's estate would only be for \$200,000—well below Wilma's \$300,000 entitlement produced by the partnership principle. If Harry "owned" \$500,000 of the marital assets, Wilma's claim would only be for \$166,500 ($1/3$ of \$500,000), which when combined with Wilma's "own" \$100,000 yields a less-than-equal share of \$266,500 for Wilma—still below her \$300,000 partnership share.

In a marriage in which the marital assets were more or less equally titled, conventional elective-share law grants the survivor a right to take a disproportionately large share. If Harry and Wilma each owned \$300,000, Wilma is still granted a claim for an additional \$100,000.

Finally, when the marital assets have been disproportionately titled in the survivor's name, conventional elective-share law entitles the survivor to compound the disproportion. If only \$200,000 were titled in Harry's name, Wilma would still have a claim against Harry's estate for \$66,667 ($1/3$ of \$200,000), even though Wilma was already overcompensated as measured by the partnership theory.

Let us now turn our attention to a very different sort of marriage—a short-term marriage, particularly the short-term marriage later in life, in which each spouse typically comes into the marriage with assets derived from a former marriage. In these marriages, the one-third fraction of the decedent's estate far exceeds a fifty/fifty division of assets acquired during the marriage.

To illustrate this sort of marriage, let us turn to the case of Wilma and Sam. Suppose that a few years after Harry's death, Wilma married Sam. Suppose that both Wilma and Sam were in their mid-to-later sixties when they were married. Then suppose that after a few years of marriage—five, let us say—Wilma died survived by Sam. Assume further that both Wilma and Sam have adult children and a few grandchildren from their prior marriages, and that each, knowing the other to be economically self-sufficient, prefers to leave most or all of his or her property to those children.

Assuming that Wilma and Sam entered their marriage equally well off, each with \$300,000 in assets, conventional elective-share law, for reasons that are not immediately apparent, gives the survivor, Sam, a right to shrink Wilma's estate (and hence the share of Wilma's estate that would otherwise go to her children from her prior marriage to Harry) by \$100,000 (reducing it to \$200,000) while supplementing Sam's assets (which at Sam's subsequent death will likely go to his children from his prior marriage) by \$100,000 (increasing their value to \$400,000). In this type of marriage, in other words, conventional elective-share law basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the "loser's" estate. The "winning" spouse—the one who chanced to survive—gains a windfall, for this "winner" is unlikely to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

How prevalent are marriages like that between Wilma and Sam—the remarriage later in life ending in the death of one of the partners a few years later? Plainly, such marriages do not affect a high proportion of the widowed and divorced population. Nevertheless, government data suggest that the incidence of such marriages may not be insignificant.⁷¹ Equally to the point,

71. Government data reveal that, within the widowed and divorced population at large, not disaggregated by age, about 21% of widowed men and about 8% of widowed women remarry; and about 83% of divorced men and 78% of divorced women remarry. U.S. DEP'T OF HEALTH & HUMAN SERVICES, PUB. NO. 89-1923, REMARRIAGES AND SUBSEQUENT DIVORCES—UNITED STATES 12 (1989). The average (mean) ages at the time of remarriage of widowed men and women have steadily increased from 57.7 in 1970 to 60.2 in 1983 for men and from 50.3 in 1970 to 52.6 in 1983 for women. The average (mean) ages at remarriage of divorced men and women have also steadily increased, but the ages are, of course, much lower. The average (mean) ages increased from 36.7 in 1970 to 37.3 in 1983 for men and from 32.8 in 1970 to 33.7 in 1983 for women. *Id.*, tbl. 4, at 24.

In 1983, the average intervals between becoming widowed and remarriage for the 65-and-older age group were 3.6 years for men and 7.9 years for women. The average intervals between divorce and remarriage for the same age group were 6.3 years for men and 10.4 years for women. *Id.* at 13.

when such marriages occur, conventional elective-share law renders results that are dramatically inconsistent with the partnership theory of marriage. That these results are seen as unjust by the children of the decedent's former marriage is both unsurprising and well documented in the elective-share case law.⁷² In a case like that of Wilma and Sam—the short-term, late-in-life marriage, which produces no children—a decedent who for all intents and purposes disinherits the surviving spouse may not be so much motivated by malice or spite toward the surviving spouse, but by a felt higher obligation to the children of his or her former, long-term marriage.

2. Implementing the Partnership Theory

The stage is now set for rethinking elective-share law. Without a theory to support it, conventional elective-share law is untenable. This alone does not necessarily make it vulnerable to change. Unsatisfactory though it may be, it will likely remain in place unless a viable system is brought forth to replace it.

Within the 65-and-older population, 2.62% of divorced men and .05% of divorced women remarried during 1983. During that same year, 1.68% of widowed men age 65 and older and .02% of women age 65 and older remarried. Within the divorced population ages 60 to 64 for that same year, 4.93% of divorced men and 1.29% of divorced women remarried; figures were not given for the widowed population ages 60 to 64 for that or any other year. The remarriage rates within the 65-and-older divorced and widowed segments of the population have been treading downward, but not in a straight line. The data show peaks and valleys over the course of the 1970-83 period. The peak occurred during the year 1975, when 3.14% of divorced men, .091% of divorced women, 1.95% of widowed men, and .021% of widowed women remarried. Data for 1975 for the 60 to 64 years age group were not reported. *Id.*, Table 3, at 23.

These marriage rates, of course, do not reveal the remarriage rates of divorced or widowed men and women age 65 and older or 60 to 64; they merely reveal the remarriage rates for a given year. Because such remarriages accumulate within the population, the incidence of remarriage later in life appears to be significant.

72. See WILLIAM DICKSON MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 156-57 (1960). Of the elective-share cases in the law reports up to the time of writing and in which the author could identify the relationships, more than half pitted children of a former marriage against a later spouse.

Statistically, "on average, women ending first marriages had 1.06 children under 18 years, those ending second marriages had 0.64 children, and those ending third marriages had 0.36 children. These differences are due at least in part to the fact that most children are born into first marriages and may not be mentioned on divorce records of subsequent marriages unless custody becomes an issue." U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 71, at 3.

The system that, in time, seems sure to replace it is one that implements the partnership theory of marriage. The pressure to bring elective-share law into line with the partnership theory can only increase. Spurred by the Uniform Marital Property Act and the Uniform Marriage and Divorce Act, the 1990 revisions of the Uniform Probate Code are now in place to offer a means of repairing elective-share law.

It is one thing to speak of implementing the partnership theory and another thing to work out a model for doing it. In seeking to implement the partnership theory, the Joint Editorial Board considered three possible approaches. The first was to use the UMDA's equitable distribution system for divorce law, that is, to extend that system into the area of the elective share. The second was to adopt a community-property system similar to the UMPA, except that it would attach only at death. The third, the one adopted, was to establish an accrual system that would approximate a fifty-fifty split of marital assets.

Because I have discussed the pros and cons of each approach elsewhere,⁷³ I will not go into a lengthy discussion of the JEB's analysis here. Briefly, the idea of extending the equitable distribution system into the area of elective-share law was rejected because of the discretionary and unpredictable nature of the results under that system. Also, unlike the divorce context, where both parties are still alive and can testify, only the survivor's side of the story can be told in the elective-share context.

The idea of imposing a deferred community-property elective share seemed a far better approach. Under this approach, the surviving spouse would have a right to claim a fifty percent share of that portion of the couple's combined assets that were acquired during the marriage other than by gift or inheritance. The disadvantage of this system is that it requires post-death classification of the couple's property to determine which is community and which is separate. Over a marriage of any length, much property that was separate property is likely to be commingled to such an extent that tracing to its source would prove administratively difficult.⁷⁴ Unlike their community-

73. Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP., PROB. & TR. J. 683, 725-34 (1992); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 242-47 (1991).

74. See, e.g., QUINN, *supra* note 50, at 81-82. Speaking of married partners in which both have paychecks, the author writes:

Poolers put all the money into a common pot. *Splitters* keep their own separate accounts. Which you choose is a matter of soul, not of finance. Poolers think that sharing is what a marriage is all about. Splitters hold to their own independence within the marriage. The previously married often split but sometimes pool. The first-time married often pool but some-

property counterparts, marital partners in title-based states are not put on notice regarding the risk involved in not maintaining good records. The administrative difficulty is also arguably greater in the elective-share context than in the divorce context, where by definition the duration of the marriage is shorter than it would have been had it ended in disinheritance at death. Finally, it is important to understand that, to the extent that presumptions would have to be imposed to resolve close questions, a deferred community-property elective share system would not yield an accurate result anyway.⁷⁵

In the end, the UPC adopted a more mechanical system that implements the partnership theory by approximation.⁷⁶ The UPC's system, which can be called an accrual-type elective share, seeks to establish an administratively simple system that approximates the results that would be achieved by a fifty-fifty split of marital assets. Under community law, each spouse from the first moment of the marriage has a right to fifty percent of the couple's assets that are acquired during the marriage other than by gift or inheritance. The hitch of course is that in the first moments of the marriage, little or no such property exists. Growth of each spouse's community-property entitlement occurs over time as the marriage continues and property is acquired and accumulated; each spouse's fifty percent share is applied to an upwardly-trending accumulation of assets.

The UPC's approximation system operates the other way around. Formally, it does not distinguish between property acquired during the marriage and other property, but compensates for this informally by applying

times split. It's so unpredictable that even your best friend might surprise you. Over time, and if the marriage goes well, splitters usually turn into *spoolers*, splitting some, pooling some, and growing less antsy about who pays for what. (emphasis in original)

Of married partners in which only one has a paycheck, the author writes: "Splitting is Out. Pooling is in."

75. See Levy, *supra* note 65, at 152-53 (noting, in the context of equitable-distribution law, that "the stronger the presumption [in favor of characterizing all property as marital property], the less likely it will be that the spouse who owned nonmarital property at marriage or received some during the marriage will try to trace the property or funds;" and that the weaker the presumption, the more likely it will be that tracing issues will be litigated).

76. For a proposal that divorce law utilize an accrual-type system for division of assets, see Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130, 159-60 (Stephen D. Sugarman & Herma Hill Kay, eds., 1990). See also AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.03A (Prelim. Draft No. 4, Sept. 9, 1993) (suggesting in general that the law should recognize that, over time, separate property is transmuted into marital property at a uniform rate).

an upwardly-trending percentage to the couple's assets whenever and however acquired. Thus the accrual schedule translates into a system that approximates the amount of marital versus separate property in marriages of various lengths. After five years of marriage, for example, each spouse's elective-share percentage is fifteen percent, which is meant to represent fifty percent of the marital-assets portion of the couple's property. By approximation, this means that thirty percent of the couple's combined assets are treated as having been acquired during the marriage and seventy percent not. After ten years of marriage, the elective-share percentage is thirty percent, which in effect treats sixty percent of the assets as having been acquired during the marriage. After fifteen years of marriage and beyond, the elective-share percentage peaks out at fifty percent, which in effect treats all of the assets as marital assets from that point forward.

The advantage of the UPC system is that it avoids the administrative difficulties of post-death classification and tracing-to-source that would be endemic to a deferred-community elective share. The trade off is that it does what its name implies—it approximates. No approximation system will give precisely accurate results in each given case. We have reason to believe, however, that the UPC system gives reasonably accurate results in nearly all cases and caution again that the other system, the deferred-community system, does not give results that are as accurate as one might think.⁷⁷

Whether implemented by approximation, as in the UPC, or by a deferred-community elective share, a partnership-based elective share has two main consequences: (1) it equalizes assets in a longer-term marriage; and (2) it reduces or eliminates the elective share in short-term, late-in-life marriages. The conventional elective share of one-third of the decedent's estate does not reward the surviving spouse sufficiently in most instances of long-term marriages and over-rewards the surviving spouse in short-term, late-in-life marriages that usually involve a widow and widower with children from their prior marriages.

To illustrate this last point, let's return to Wilma and Sam and apply the UPC system to their late-in-life marriage. Recall that each came out of their main marriages with about \$300,000 in assets. Their marriage to each other having lasted five years, the elective-share percentage prescribed in the statute is fifteen percent.⁷⁸ Sam's elective-share entitlement is \$90,000 (fifteen percent of their combined assets of \$600,000). But this does not mean that Sam has a \$90,000 claim against Wilma's estate. Thirty percent of Sam's own \$300,000 in assets (double the elective-share percentage) count in fulfilling Sam's elective-share amount. Since thirty percent of Sam's assets

77. See Waggoner, *supra* note 73, at 741-42.

78. See UPC § 2-202(a) (1993).

is \$90,000, there is no deficiency and hence no claim to any of Wilma's assets.

Although this approach does not eliminate the desirability of a premarital agreement in second marriages, it does make such an agreement less essential by removing the disincentive to remarriage on the part of older widows and widowers that conventional elective-share systems now impose. When an older widow and widower—each financially independent and each with adult children from a prior, main marriage—want to get married, a concern that often arises is that the survivor of the two will take a large portion of the other's property and deprive the decedent's children of their inheritance. As the financial journalist Jane Bryant Quinn said in a recent book:

[When older people remarry,] your friends will be enchanted. But don't be surprised if your children aren't. It's usually not the "pater" they worry about, but the patrimony. If your new spouse gets your property after your death, he or she is free to cut your children out. Even if you own assets separately, state inheritance laws [referring to elective-share laws, not intestacy laws] usually require that the spouse get one-third to one-half.⁷⁹

A partnership-based elective share serves to remove that concern.

3. Need to Supplement Partnership Elective Share With a Support Theory Element

As sensible as the partnership theory is, it is not sufficient by itself to "do right" by all surviving spouses. One persistent criticism of the partnership theory as applied to divorce law is that it often leaves divorced women without an adequate means of support.⁸⁰ This is because the traditional

79. Quinn, *supra* note 50, at 83.

80. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* chs. 6 & 10 (1992); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* Ch. 7 (1985); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching Solutions to the Mystery*, 23 FAM. L.Q. 253, 271 n. 65 (1989); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 352, 391-92 (1987); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 201-04 (Stephen D. Sugarman & Herma Hill Kay, eds., 1990); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEXAS L. REV. 689 (1990); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130 (Stephen D. Sugarman & Herma Hill Kay, eds., 1990). But see SUSAN FALUDI,

division of labor within a marriage allows the husband to devote his energy to his career while the wife devotes her energy to what the economists call "household production." An equal division of assets saved during the marriage still leaves the divorced wife far behind in earning power after a divorce than she would have been had she devoted her energy during the marriage to a career.⁸¹ This criticism of divorce law does not apply, of course, to all divorced spouses, but mainly to those who come out of the failed marriage with diminished work skills.

The problem is, if anything, more endemic to elective-share law, where the surviving spouse is typically beyond working years. One of the theories traditionally thought to underlie elective-share law involves a post-death duty of support, that is, that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate.

Conventional elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may far exceed the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law, as it is in intestacy law. The problem is not addressed in intestacy law because intestacy affects so many estates of small size. Elective-share law can accommodate a more individuated system, however, because elections are the exception in estate practice.

The UPC's elective-share system, therefore, seeks to implement the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

The UPC implements the support theory by providing a supplemental elective-share amount of \$50,000.⁸² This feature is not like the lump-sum device used in intestacy law. Here, the surviving spouse's own title-based ownership interests, amounts shifting to the survivor at the decedent's death, and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above are counted first toward making up this \$50,000 amount. (Amounts going to the survivor under the

BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 1-35 (1991).

81. See Stake, *Fostering Primate Ordering by Forcing Parties to Bargain: A Matrimonial Mandate to Deal with Divorce*, 2 L. REV. J. 1, 5-12 (1991).

82. UPC § 2-202(b) (1993).

Code's probate exemptions and allowances⁸³ and the survivor's Social Security and other governmental benefits are not counted, however.) Only if the survivor's assets and entitlements are less than the \$50,000 minimum is the survivor entitled to whatever additional portion of the decedent's estate is necessary, up to 100% of it, to bring the survivor's assets and entitlements up to that minimum level.⁸⁴

If there could be any complaint about this feature of the UPC system, it would be that the \$50,000 figure is too low. With average social security payments added in, \$50,000 at current interest rates will generate an income stream of only \$723 a month (\$8,676 a year), which is only \$200 a month above the poverty level. The figure of \$50,000 is given in brackets in the Code, which means that any state is invited to supply a different figure if it so chooses. A somewhat higher figure might be quite appropriate.

4. Protection Against Will Substitutes

I would now like to turn to another feature of elective-share law. Conventional statutes grant the surviving spouse a right to elect a fractional share of the decedent's "estate." In our parlance, the term "estate" normally means the *probate* estate, *i.e.*, the property owned at death and included in the gross estate for estate tax purposes under IRC section 2033.

One of the most troublesome issues under these "estate" statutes is the extent to which spousal elective-share rights extend to will substitutes. An elective share is just as ineffective if it applies only to the decedent's probate estate as the federal transfer taxes would be if there were no gift tax and the estate tax only contained section 2033. The elective-share system would serve only as a blueprint for evasion.

a. Common-Law Theories

Estate statutes shift to the judicial system the task of breathing integrity into the elective share. In the earlier part of this century, the courts only halfheartedly rose to the occasion, by adopting one or the other of two approaches: the fraudulent-intent test or the illusory-transfer test. The illusory-transfer test is the predominant view. The leading case adopting the illusory-transfer test is *Newman v. Dore*,⁸⁵ a New York case that arose in the late 1930s. In that case, Ferdinand Straus, an 80-year-old testator, executed trust agreements by which he transferred all his real and personal property to his trustees. The trust agreements were executed three days before his death

83. UPC § 2-202(c) (1993).

84. UPC § 2-209(b), (c) (1993).

85. 9 N.E.2d 966 (N.Y. 1937).

and when cross actions for dissolution of his marriage were pending. The terms of the trusts reserved to Straus the right to the income for life, the power to revoke the trusts, and the power to control the trustees in all aspects of the trusts' administration; needless to say, Straus's wife of four years, a woman in her thirties, received no beneficial interest in these trusts. In holding that the trusts were part of Straus's estate for purposes of his widow's rights, the New York Court of Appeals "judged [the trust] by the substance, not by the form." Under this test, "the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed."

Although it was by no means the first case to have formulated this general approach,⁸⁶ the decision in *Newman v. Dore* had substantial influence on the law in other states.⁸⁷ Although promising in theory, the illusory-transfer doctrine of *Newman v. Dore* has, for the most part, given the surviving spouse very limited protection against will substitutes.⁸⁸ Among the courts accepting the doctrine, one of the most common will substitutes of all, the revocable trust with a retained life estate, has been held not to be

86. In *Gentry v. Bailey*, 47 Va. (6 Gratt.) 594 (1850), the court observed that it was "not at all material by what motive the husband was actuated in making the disposition of his property." However, the right given the surviving spouse by the election statute was one that "the husband cannot defeat by any contrivance for that purpose Whatever may be the form of the transaction, if the substance of it be a testamentary disposition, it cannot be effectual in relation to the wife. If this were otherwise, the statute might be rendered a dead letter at the volition of the husband."

87. In New York, the ruling of the case has been superseded by comprehensive legislation that protects the surviving spouse against specified will substitutes. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981).

88. The comprehensive work in the field is WILLIAM DICKSON MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960). See also Schuyler, *Revocable Trusts—Spouses, Creditors and Other Predators*, 1974 INST. ON EST. PLAN. ch. 13; John P. Lucington, Annotation, *Determination of, and Charges Against, "Augmented Estate" Upon Which Share of Spouse Electing to Take Against Will is Determined Under Uniform Probate Code*, 63 A.L.R.4th 1173 (1988); Annotation, *Gift or Other Voluntary Transfer by Husband as Fraud on Wife*, 49 A.L.R.2d 521 (1956); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 13.7, Reporter's note, at 101-11 (1986).

illusory.⁸⁹ There was even some doubt that a Totten trust is illusory under the illusory-transfer test.⁹⁰

A breakthrough finally occurred in the important 1984 Massachusetts decision of *Sullivan v. Burkin*.⁹¹ In an opinion written by Justice Herbert Wilkins, the court held that assets held in a revocable inter-vivos trust created during the marriage⁹² are part of the estate in determining the surviving spouse's elective share. The court engaged in the frequently applied Massachusetts practice of *prospective* overruling, so that the new rule was not applied to the *Sullivan* case itself. For the future, however, the court held that

89. See, e.g., *Johnson v. LaGrange State Bank*, 383 N.E.2d 185, 192 (Ill. 1978) (quoting ILL. REV. STAT. ch. 110 1/2 § 601 (1977)); *Kerwin v. Donaghy*, 59 N.E.2d 185 (Mass. 1945), *prospectively overruled in Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984); *Beirne v. Continental-Equitable Trust Co.*, 161 A. 721 (Pa. 1932); see also RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. c (1959); *Johnson v. Farmers & Merchants Bank*, 379 S.E.2d 761 (W.Va. 1989). In a 1944 Ohio decision, such a trust was held ineffective against the claim of a surviving spouse, *Bolles v. Toledo Trust Co.*, 58 N.E.2d 381 (Ohio 1944), but the decision was later overruled in *Smyth v. Cleveland Trust Co.*, 179 N.E.2d 60 (Ohio 1961).

On the other hand, the Supreme Court of Maine seemed to indicate that a revocable trust with a retained life estate might be "illusory" under the illusory-transfer doctrine. See *Staples v. King*, 433 A.2d 407 (Me. 1981). Maine subsequently enacted the augmented-estate concept of the pre-1990 UPC.

90. Compare *Matter of Halpern*, 100 N.E.2d 120 (N.Y. 1951) and *Jeruzal's Estate v. Jeruzal*, 130 N.W.2d 473 (Minn. 1964), with *Montgomery v. Michaels*, 301 N.E.2d 465 (Ill. 1973).

91. 460 N.E.2d 572 (Mass. 1984).

92. The facts in the case were that, in September 1973, Ernest G. Sullivan executed a deed of trust under which he transferred real estate to himself as sole trustee. The net income of the trust was payable to him during his life and the trustee was instructed to pay to him all or such part of the principal of the trust estate as he might request in writing from time to time. He retained the right to revoke the trust at any time. On his death, the successor trustee is directed to pay the principal and any undistributed income equally to George F. Cronin Sr., and Harold J. Cronin, if they should survive him, which they did.

The husband died on April 27, 1981, while still trustee of the inter-vivos trust. He left a will in which he stated that he "intentionally neglected to make any provision for my wife, Mary A. Sullivan and my grandson, Mark Sullivan." He directed that, after the payment of debts, expenses, and all estate taxes levied by reason of his death, the residue of his estate should be paid over to the trustee of the inter vivos trust. George F. Cronin Sr., and Harold J. Cronin were named coexecutors of the will.

Ernest and Mary had been separated for many years. At his death, Ernest owned personal property worth approximately \$15,000. The only asset in the trust was a house in Boston which was sold after his death for approximately \$85,000.

as to any inter vivos trust created or amended after the date of this opinion, we announce that the estate of a decedent . . . shall include the value of assets held in an inter vivos trust created by the deceased spouse as to which the deceased spouse alone retained the power during his or her life to direct the disposition of those trust assets for his or her benefit, as, for example, by the exercise of a power of appointment or by revocation of the trust. Such a power would be a general power of appointment for Federal estate tax purposes . . . and a "general power" as defined in the Restatement (Second) of Property

More significantly, the court also noted: "What we have announced as a rule for the future hardly resolves all the problems that may arise." The court then ticked off a laundry list of undecided questions, questions whose resolution will have to await future case-by-case adjudication.⁹³ Citing the Uniform Probate Code, the court added that "The question . . . is one that can best be handled by legislation."

b. Augmented-Estate Legislation

It now seems clear that courts will more and more incline toward protecting surviving spouses against disinheritance by will substitute. There is, after all, no principled way of defending a system that prohibits disinheri-

93. In full, the court's statement was:

There may be a different rule if some or all of the trust assets were conveyed to such a trust by a third person. . . . We have not, of course, dealt with a case in which the power of appointment is held jointly with another person. If the surviving spouse assented to the creation of the inter vivos trust, perhaps the rule we announce would not apply. We have not discussed which assets should be used to satisfy a surviving spouse's claim. We have not discussed the question whether a surviving spouse's interest in the intestate estate of a deceased spouse should reflect the value of assets held in an inter vivos trust created by the intestate spouse over which he or she had a general power of appointment. That situation and the one before us, however, do not seem readily distinguishable. A general power of appointment over assets in a trust created by a third person is said to present a different situation. Restatement (Second) of Property, Supplement to Tent. Draft No. 5, reporter's note to § 13.7, at 29 (1982). Nor have we dealt with other assets not passing by will, such as a trust created before the marriage or insurance policies over which a deceased spouse had control.

Sullivan, 460 N.E.2d at 30, 38.

tance by will but not by will substitute. This movement, begun by *Sullivan*, can only be spurred on by the adoption of a similar approach published in 1986 and 1992 in the Restatement (Second) of Property (Donative Transfers).⁹⁴ If this is the case, then it would seem to be far preferable to enact legislation along the lines of the augmented-estate concept of the Uniform Probate Code or some similar model and be done with it, so that estate planners know what the rules are. Otherwise, the rules will have to be developed on a case-by-case basis and may take years or decades before the full scope of the spouse's protection becomes clarified in a particular jurisdiction.

Under the UPC, the surviving spouse's elective-share percentage is applied to the augmented estate. The augmented estate serves two basic functions. By combining the couple's assets, it plays a crucial part under the 1990 Code in implementing the partnership theory. The other function is to provide a means of protecting the spouse against evasion by will substitute. To these ends, the augmented estate consists of the sum of the values of four components: (1) the decedent's net probate estate; (2) the decedent's nonprobate transfers to others;⁹⁵ (3) the decedent's nonprobate transfers to the surviving spouse; and (4) property owned by the surviving spouse and amounts that would have been included in the surviving spouse's nonprobate-transfers-to-others component had the spouse predeceased the decedent.

The function of protecting the spouse against evasion by will substitute is performed by the nonprobate-transfers-to-others component of the augmented estate. The concept of providing in the statute itself a list of will substitutes to be subjected to the surviving spouse's elective share⁹⁶ was pioneered by legislation in New York and Pennsylvania and adopted by the pre-1990 UPC.

94. Section 34.1 of the Restatement provides:

(3) An inter vivos donative transfer to others than the donor's spouse that is a substitute for a will, or that is revocable by the donor at the time of the donor's death, is subject to spousal rights of the donor's spouse in the transferred property that would accrue to the donor's spouse on the donor's death if the transfer had been made by the donor's will.

See also *id.* § 13.7, the comment to which states that this provision is not restricted to transfers that took place during the marriage.

95. As originally promulgated in 1990, this component was called the "reclaimable estate." This term was replaced by technical amendment in 1993 with the term "nonprobate transfers to others."

96. The UPC's list is contained in §§ 2-203 to 2-207 (1993).

The 1990 UPC revisions, which were reorganized and clarified in 1993,⁹⁷ strengthen the nonprobate-transfers-to-others component.⁹⁸ The pre-1990 version contained several loopholes. The most important of these was life insurance that the decedent purchased, naming someone other than his or her spouse as the beneficiary. Under the 1990 and 1993 revisions, proceeds of these policies are included in the decedent's nonprobate transfers to others.⁹⁹

The other important feature of the revisions is that the decedent's nonprobate transfers to others now include property that is subject to a presently exercisable general power of appointment held solely by the decedent.¹⁰⁰ Such powers are viewed as substantively indistinguishable from outright ownership. The power need not have been created by the decedent and need not have been conferred on the decedent during the marriage. The decedent need only have held the power immediately prior to his or her death¹⁰¹ or have exercised or released the power in favor of someone other than the decedent, the decedent's estate, or the decedent's spouse while married to the spouse and during the two-year period next preceding the decedent's death.¹⁰²

IV. WHO IS A SPOUSE?

The rights discussed above are granted to the person who holds the *status* of spouse. Spousal status is what grants the person a right to an intestate share and the right to elect a forced share if dissatisfied with the decedent's

97. Because the elective-share provisions, as reorganized and clarified in 1993, have not been widely disseminated, they are set forth in Appendix B, *infra*.

98. See UPC § 2-205 (1993).

99. UPC § 2-205(1)(iv) (1993). Including life insurance on the decedent's life as part of the estate subject to the elective share is consistent with § 34.1(3) of the Restatement (Second) of Property (Donative Transfers) (1991). For purposes of this section, life insurance policies owned by the insured at death and payable to someone other than the insured's surviving spouse are "substitute[s] for a will." See *id.* § 32.4 cmt. f. This section provides that inter vivos donative transfers that are "substitute[s] for a will" and are payable to someone other than the donor's surviving spouse are subject to the same spousal rights the spouse would have if the transfer had been made in the donor's will. See *supra* note 94.

100. See UPC § 2-205(1)(i) (1993). The term "presently exercisable general power of appointment" is a defined term and includes a reserved power of revocation in a revocable trust. See UPC § 2-201(6) (1993). See also RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 11.1 cmt. c & illus. 5 (1986); Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984).

101. UPC § 2-205(1)(i) (1993).

102. UPC § 2-205(3)(i) (1993).

estate plan. Spousal status is also what grants original ownership of half the property acquired during the marriage in the community-property states. Basing these rights on status is not only beneficial to the spouse, but also efficient for society. It means that spouses can claim these rights without having to prove anything about the underlying details or commitment of their relationships.¹⁰³ The marriage certificate itself qualifies the person for what the law allows.

As my final topic, I want to turn to the situation of the unmarried cohabitor or domestic partner. Unmarried cohabitators or domestic partners lack marital status and hence the automatic rights granted to spouses. When a domestic partner dies, the status law grants the surviving partner none of the rights surveyed in the first three parts of this article. If the decedent dies intestate, the decedent's surviving partner receives no intestate share and receives no right to elect against the decedent's will. Intestate succession law gives a surviving spouse a large intestate share on the theory of imputed or attributed intent—the law deduces that most decedents (assuming a sound marriage) would have wanted to leave everything to the survivor or at least a substantial enough portion to give the survivor economic security.

103. A few states, by statute, bar the surviving spouse from taking for desertion or adultery. *See* KY. REV. STAT. ANN. § 392.090 (Michie/Bobbs-Merrill 1984) (spouse barred if spouse "leaves the other and lives in adultery," unless the spouses "afterward become reconciled and live together as husband and wife"); N.H. REV. STAT. ANN. § 560:19 (1974) (spouse barred "if at the time of the death of either husband or wife, the decedent was justifiably living apart from the surviving husband or wife because such survivor was or had been guilty of conduct which constitutes cause for divorce"); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(5), (6) (McKinney 1981 & Supp. 1994) (spouse barred if spouse "abandoned the deceased spouse, and such abandonment continued until the time of death" or if the spouse "who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support"); 20 PA. CONS. STAT. ANN. § 2106 (Supp. 1993) (spouse barred "who, for one year or upwards previous to the death of the other spouse, has wilfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has wilfully and maliciously deserted the other spouse"); VA. CODE ANN. § 64.1-16.3 (Michie 1991) (spouse barred if spouse "wilfully deserts or abandons his or her spouse and such desertion or abandonment continues until the death of the consort"). *See also* HAW. REV. STAT. § 533-9 (1985).

A few courts, without statutory authority to vary the rights provided to surviving spouses, have denied claims against decedents' estates by persons who were lawfully married to the decedents when they died. *See, e.g.,* Estate of Abila, 197 P.2d 10 (Cal. 1948) (wife barred because interlocutory decree of divorce, granted to decedent before his death, terminated decedent's obligation of support, though it did not dissolve the marriage).

Regarding unmarried couples, the law grants the survivor no share at all; the omission treats the surviving partner as no more a natural object of the decedent's bounty than a complete stranger. Elective-share law gives a disinherited surviving spouse a right to a certain fraction of the decedent's property, whether the decedent wanted the survivor to have anything or not. The claim is based on either a right to support or a financial partnership theory or, more conventionally, a carryover from common-law dower. Regarding unmarried couples, the law grants the survivor no right against being disinherited, thus treating the surviving partner as having contributed nothing to the decedent's wealth.

Who are these domestic partners and what do we know about them? Actually, we are beginning to know a fair amount.¹⁰⁴ As of 1990, according to Census Bureau estimates, there were nearly 3 million cohabiting couples in the United States,¹⁰⁵ as compared with only about 450,000 such couples in 1960. The number of these arrangements increased significantly in the 1970s and 80s and continues to increase in the 90s. Of course, the term "cohabiting couple" is itself indeterminate. Is it restricted to couples whose only household is their shared one? Or, does it also include other, less clear examples such as the yuppie who has an apartment but lives for days, weeks, or months on end at the other's apartment? The numbers we have count only those who share a single household.

Although at the current time, only four percent of all Americans age 19 and older are cohabiting, the percentage is far higher at the younger ages. In the age 19 to 34 category, about one in seven never-married and about one in four formerly married persons are currently cohabiting. As might be expected, the rates are lower for middle-aged and older people. Fewer than five percent of unmarried persons in their 50's and about percent percent of those 60 and older are cohabiting. In recent years, about 42 percent of those marrying for the first time cohabited at some time prior to their marriage, mostly with their first spouse only, and about three-fifths of those entering second marriages cohabited between their first and second marriages.

The most important statistic for spousal-rights law is that for most people cohabitation is a temporary or short-term state. The parties either break up or get married fairly quickly. By about one and one-half years, half the

104. The demographic information is drawn from James A. Sweet & Larry L. Bumpass, *Disruption of Marital and Cohabitation Relationships: A Social-Demographic Perspective*, Working Paper No. 32 (Nat'l Survey of Families and Households, 1990); Larry L. Bumpass, *What's Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 *DEMOGRAPHY* 483 (1990); Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, Working Paper No. 5 (Nat'l Survey of Families and Households, 1989).

105. See *NEWSWEEK*, March 23, 1992, at 62.

cohabiting couples have either married or broken up. Only about ten percent remain cohabiting after five years. This does not mean, however, that at any point in time there are only a few longer-term or marriage-like cohabitations. The longer-term cohabitations tend to accumulate in the population. Twenty percent of cohabiting couples, in fact, have lived together for five or more years. Many are gay or lesbian couples for whom marriage is not an option.¹⁰⁶ But most are heterosexual couples who, for one reason or another, remain together without marrying. The duration of cohabiting unions is longer among persons previously married. Also, children are more frequently present in such unions than you might think. Demographers have reported that children are present in forty percent of cohabiting households. This breaks down to one-third of the never-married householders and almost half of the previously married householders. More significantly,

one-sixth of never-married cohabiting couples have a child that was born since they began living together. . . . [T]his represents a significant component of unmarried births (about a quarter) that are not born into single-parent households.

Further, the children in cohabiting households are not all young children. . . . [A] quarter of the households with children have children age 10 or older; mostly living with previously-married parents. In thinking about the meaning of cohabitation and the dynamics of cohabiting households, it is critical to keep in mind that issues of parenting and step-parenting are very much a part of the picture.¹⁰⁷

The longer-term cohabitations are the ones that tend to find their way into the legal system. Like married couples, this happens upon disinheritance at death or, more commonly, the deliberate decision of one of the parties to terminate the relationship. The unmarried-cohabitators cases that come to *public* attention nearly always involve a defendant who is a wealthy celebrity, entertainer, or professional athlete. But the less celebrated come to court also. As a Houston divorce attorney remarked: "You don't need millions of dollars for people to fight. Give two people a house worth \$200,000 and they'll consider an action."¹⁰⁸

106. *But see* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (vacating a trial court decision that dismissed a complaint challenging, on state constitutional grounds, Hawaii's prohibition of same-sex marriages and remanding the case to allow the state an opportunity to justify the prohibition on the ground of a compelling state interest). For a discussion of same-sex marriages in historical context, see William N. Eskridge Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

107. Bumpass et al., *supra* note 104, at 10.

108. Gary Taylor, *Increased Mobility Adds to Common Law Claims*, NAT'L L.J.,

These suits are sometimes grounded on a common-law marriage claim, but when that claim is unavailable because the state does not recognize common-law marriages or because the arrangement does not fit within the criteria, they can still go forward as a "palimony suit."¹⁰⁹ Not surprisingly, as noted, most of the cases arise in the context of a dissolution during life. Claims arising at death are less common because, if the partners remain devoted to one another, the surviving partner is probably provided for in the decedent's will or other parts of the estate plan.¹¹⁰ Therefore, it is less usual for cases to arise in which a surviving partner is making a claim to a share of a decedent's estate, but such cases do arise.¹¹¹

Aug. 14, 1989, at 24.

109. The term "palimony" is misleading because the plaintiff is usually seeking a division of the couple's property, not an award of periodic payments similar to alimony.

110. In speaking of the power of testation, Jeremy Bentham noted that "a man . . . should have the means of cultivating the hopes and rewarding the care of . . . a woman who, but for the omission of a ceremony, would be called his widow" BENTHAM, *supra* note 3, at 185-86.

See generally, however, Joseph W. deFuria Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200 (1989) ("[Although only] a few courts [raise] a rebuttable presumption of undue influence . . . whenever the testator willed his estate to a meretricious partner . . . [m]any more courts emphasized that such a relationship raised a significant suspicion of undue influence, which would be closely scrutinized."); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981) ("[T]here is at least some evidence to suggest that a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned than does a heterosexual testator who bequeaths the bulk of his estate to a spouse or lover."); Jane Birnbaum, *Gay Partners' Problem: Passing on Their Assets*, N.Y. TIMES, Jan. 15, 1994, at 31 ("Propelled in part by the AIDS epidemic, gay men and lesbians increasingly look to revocable living trusts as a way to efficiently pass on assets to their partners and to insure their partners will handle their personal affairs if they become incapacitated. . . . Because the trusts generally avoid probate and are unpublished, the deceased's family is less likely to intervene than with a will."); Annotation, *Existence of Illicit or Unlawful Relation Between Testator and Beneficiary as Evidence of Undue Influence*, 76 A.L.R.3d 743 (1977).

111. Although most of the cases have involved property disputes between living cohabitators who have separated, some cases have involved contractual or equitable claims by the survivor to a share of the other's estate upon the latter's death. Complaints founded upon breach of oral promises supported by social, domestic, nursing, and business services have been held to state a cause of action. See, e.g., *Poe v. Estate of Levy*, 411 S.2d 253 (Fla. Ct. App. 1982) (reversing trial court's dismissal of count seeking enforcement of an express support contract and count seeking

Plaintiffs seem to have no problem in stating a cause of action when they allege that they made a *financial* contribution toward the purchase of specific property on the understanding that they would be the owner or part owner. The fact that the property was not titled in the plaintiff's name is not a

imposition of a constructive trust in certain property due to a confidential relationship between surviving cohabitor and decedent, but affirming trial court's dismissal of count seeking one-half ownership interest in decedent's property grounded on argument that their relationship had the same force and effect as a legal marriage); *Donovan v. Scuderi*, 443 A.2d 121 (Md. Ct. Spec. App. 1982) (plaintiff entitled to recover damages for breach of express oral promise to pay to plaintiff 1,000 shares of stock of the bank of which the decedent was chairman of the board, in return for which plaintiff made various expenditures and provided loans and services, including "catering services, personal shopping services, clothing, furniture and furnishings;" decedent, a married man, and plaintiff, an unmarried woman, did not have a full-time cohabitation relationship, but frequently used an apartment plaintiff had obtained at decedent's request); *Tyranski v. Piggins*, 205 N.W.2d 595 (Mich. Ct. App. 1973) (surviving cohabitor entitled to specific performance of decedent's oral promise to convey house to her; plaintiff, a married woman who was separated from her husband, performed various domestic, social, and nursing services for decedent).

Complaints have also been held to state a cause of action when they sought the imposition of a constructive trust on specific property based on a confidential relationship between the cohabitators. *See, e.g., Poe*, 411 So.2d at 256. Complaints seeking damages in the amount of the value of such services on the theory of quantum meruit (as much as the plaintiff deserved) have also been upheld. *See, e.g., Green v. Richmond*, 337 N.E.2d 691 (Mass. 1975) (surviving cohabitor entitled to quantum meruit recovery of damages for value of social, domestic, and business services performed in reliance on decedent's oral promise to leave a will devising his entire estate to her; *Humiston v. Bushnell*, 394 A.2d 844 (N.H. 1978) (lack of proof of alleged oral promise to devise a certain parcel of realty prevented surviving cohabitor from recovering damages for breach; surviving cohabitor was entitled to recover in quantum meruit for value of "intimate, confidential, and dedicated personal and business service" she performed for the decedent with the expectation of being ultimately compensated therefor); *Estate of Steffes*, 290 N.W.2d 697 (Wis. 1980) (surviving cohabitor entitled to recover damages for value of housekeeping, farming, and nursing services rendered at decedent's request and with the expectation of being compensated therefor).

Also, complaints seeking the imposition of an implied partnership with respect to a business arrangement have been upheld. *See, e.g., Estate of Thornton*, 499 P.2d 864 (Wash. 1972) (surviving cohabitor entitled to recover on basis of an implied partnership in cattle-raising business). But the dismissal of a complaint seeking a half interest in the decedent's property based on the theory that the parties' relationship had the same force and effect as a legal marriage was affirmed. *See, e.g., Poe*, 411 So.2d at 256.

defense. A cause of action for the imposition of a purchase-money resulting trust or a constructive trust on the specific property is well established.¹¹²

But what if the plaintiff's contribution came in the form of *domestic services*? The case that has received the most notoriety is *Marvin v. Marvin*.¹¹³ The *Marvin* case was one of the first cases to confront the problem of remedy in a domestic-services case. These are the cases in which the domestic partnership follows the division-of-labor pattern of the traditional marriage. The plaintiff specializes in "household production," an asset perhaps worth something in the "remarriage market" after dissolution, but worth little in the labor market. The defendant specializes in career advancement, a "divorce-proof" asset.

These plaintiffs, consequently, are entering into a much riskier venture than those entering into a marriage with a similar division of labor. Those entering into a marriage with a similar division of labor at least have the divorce laws and the intestacy and elective-share or community-property laws as back-up protection. Those entering such a relationship without marriage have virtually no legal rights to fall back on.

What can they do to protect themselves? One thing they can do is to insist on protection by contract, just as married persons use a premarital agreement. Academic lawyers tend to call this "private ordering." The reality is, however, that in a lot of the litigated cases, there is an enormous disparity of bargaining power. By being older and already wealthy, the defendant is often in the dominant position. For this reason, and because bargaining is done in the shadow of one's legal rights and the unmarried have virtually no back-up legal rights, the plaintiff is in a "subordinate" position. If there is to be a contract, a *written* contract, the partner insisting on it is likely to be the dominant defendant, not the subordinate plaintiff.¹¹⁴ The contract is more likely to take the form of what one lawyer calls a "Non-Marvenizing"

112. See, e.g., *Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983) (surviving cohabitor entitled to constructive trust in her favor of a one-half interest in home purchased with joint funds but titled in decedent's name alone).

113. 557 P.2d 106 (Cal. 1976)

114. Premarital agreements are enforceable only if in writing. See UNIFORM PREMARITAL AGREEMENT ACT § 2 (1983) ("A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.").

Legislation in Minnesota provides that an express written contract "between a man and a woman who are living together . . . out of wedlock" is valid, even if "sexual relations between the parties are contemplated," but also provides that, in absence of an express written contract, any claim to another's earnings or property must be dismissed as contrary to public policy if it is "based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state." MINN. STAT. ANN. §§ 513.075, .076 (West 1990).

agreement, under which the subordinate plaintiff in effect waives all rights.¹¹⁵ The plaintiff is likely just as frightened to raise or press the subject of a contract as marriage. Plaintiffs who do press the issue, gently or not, are more likely to get vague oral statements than a written contract for their effort.

Consequently, the plaintiff in a lot of the litigated cases alleges an *oral* contract, which in the end may not be provable. The *Marvin* case fell into this category. The plaintiff, Michelle Triola, brought a breach of contract action against the defendant, Lee Marvin. Because the trial court granted judgment on the pleadings for the defendant, the question on appeal was whether the plaintiff's complaint stated a cause of action. The California Supreme Court held that it did, but on remand Michelle could not prove her allegation.

The facts alleged in Michelle's complaint were that in October of 1964, she and Lee "entered into an oral agreement." As is typical of these complaints, Michelle not only listed the domestic services she agreed to perform but also the opportunities for employment or training she agreed to forgo. The services she listed were "companion, homemaker, housekeeper and cook." Michelle's forgone opportunities were "her lucrative career as an entertainer [and] singer." Lee, in turn, she alleged, not only agreed "to share equally any and all property accumulated" during the cohabitation¹¹⁶ but also "to provide for all of [her] financial support and needs for the rest of her life."

Michelle and Lee lived together for about five and a half years (from October 1964 through May 1970). During this period, she alleged, the parties as a result of their efforts and earnings acquired in Lee's name substantial real and personal property, including motion picture rights worth over \$1 million.

115. The lawyer, as reported in QUINN, *supra* note 50, at 84, is William P. Cantwell, who served as the Reporter for the UMPA. His "Non-Marvenizing" Agreement, which would be suitable for parties of equal bargaining power, states:

We have decided to live together beginning on _____. We do not intend that any common law marriage should arise from this. We have not made any promises to each other about economic matters. We do not intend any economic rights to arise from our relationship. If in the future we decide that any promises of an economic nature should exist between us, we will put them in writing, and only such written promises made by us in a written memorandum signed by us in the future shall have any force between us. Signed at _____ on _____.

116. Michelle's actual allegation was that the parties agreed that "they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." But, since it appears that the parties contemplated that Michelle would remove herself from the work force, it appears that it was Lee's earnings that were to be shared.

In May 1970, however, Lee (in the language of the complaint) "compelled" her to leave his household. He continued to support her for another year and a half (until November 1971), but thereafter refused to provide further support.

In a landmark decision, the California Supreme Court held that her complaint stated a cause of action. There are two questions addressed by the *Marvin* decision that I'd like to discuss. First: Is an express contract enforceable, assuming that it can be proved if oral? Second: If no express contract can be proved, does the disappointed domestic partner have any rights at all?

A. Enforceability of an Express Contract—the "Meretricious" Consideration Problem

The principle obstacle to recovering for breach of an express oral contract, other than the necessity of proving the contract, was what the courts call the "meretricious" nature of such a relationship—that the relationship involved sexual activity. Because prostitution is illegal, a contract for prostitution is unenforceable. A few post-*Marvin* decisions in other states have held that contracts between unmarried cohabitators are flat unenforceable for that reason alone, citing public policy grounds.¹¹⁷ Those decisions are still presumptively good law in those states.

The *Marvin* court sought to remove this obstacle to enforcement. The court held that the sexual component of the arrangement could prevent enforcement only if the contract was "expressly and inseparably based upon an illicit consideration of sexual services."¹¹⁸ This was not the case in *Marvin*, for Michelle did not allege that one of the services for which Lee agreed to pay was for her to be Lee's lover.

The time has surely come to put the meretricious-consideration argument behind us. It is surely time to remove it as *any* potential obstacle at all to

117. See, e.g., *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977) ("It is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration. Code Ann. § 20-501. . . . The parties being unmarried and the appellant having admitted the fact of cohabitation in both verified pleadings, this would constitute immoral consideration under Code Ann. § 20-501"); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) ("Illinois' public policy regarding agreements such as the one alleged here was implemented long ago . . . where this court said: 'An agreement in consideration of future illicit cohabitation between the plaintiffs is void.' . . . The issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State. The question whether change is needed in the law . . . [is best left to] the legislative branch . . .").

118. *Marvin*, 557 P.2d at 114.

enforcement of these agreements, as the Supreme Court of Connecticut has forthrightly held in a recent case,¹¹⁹ for there is no way these cases involve agreements for prostitution. Perhaps the *Marvin* court thought it had done that by making contracts enforceable unless the contract was "expressly and inseparably" based upon "sexual services." In stating this principle, the court may have been groping for a way to fit domestic partnerships into a spectrum between contracts for prostitution on the one end and marriages on the other. Marriages, like domestic partnerships, undeniably involve both a financial and a sexual component. But so do contracts for prostitution. Perhaps the *Marvin* court thought that the distinction between marriage and prostitution was that the sexual and financial components are express and inseparable in the case of prostitution, whereas in marriage, the two components are not expressly dependent upon each other. The existence of these two components in a marriage is merely implicit in the nature of the marital relationship. Perhaps the *Marvin* court concluded that a good way to liken domestic partnerships to marriages and not to contracts for prostitution was to emphasize the express and inseparable interdependence of the financial and sexual components in a contract for prostitution.

A truer distinction between marriage and the typical contract for prostitution is the existence in marriage of the linking together of two whole lives, emotionally, financially, and physically, through sharing the same household in an arrangement involving love, romance, commitment, caring, and so on. This third component is missing from a typical contract for prostitution, but it is not missing from a domestic partnership. The *Marvin* court would have been on sounder ground if it had distinguished contracts for prostitution from domestic partnerships on this basis rather than on the "express and inseparable" basis. This approach would have completely removed the obstacle of meretricious consideration from enforcement of the financial component of domestic-partnership contracts.

Perhaps the *Marvin* court thought that the "express and inseparable" distinction itself eliminated the meretricious consideration obstacle for all domestic partnership cases. If so, it did not turn out that way. It was easy in *Marvin* to sever the sexual component of the parties' relationship because Michelle's complaint never alleged that one of her "services" was to be Lee's lover. Nevertheless, in a subsequent California case, *Jones v. Daly*,¹²⁰ the plaintiff made the mistake of alleging in his complaint that one of the services he agreed to perform, in addition to domestic services, was to be the defendant's "lover." This proved to be fatal, for the court held that the

119. See *Boland v. Catalano*, 521 A.2d 142, 146 (Conn. 1987) ("We conclude that our public policy does not prevent the enforcement of agreements regarding property rights between unmarried cohabitants in a sexual relationship.").

120. 176 Cal. Rptr. 130 (1981).

complaint did not state a cause of action, citing the ground that the plaintiff's "allegations clearly show that plaintiff's rendition of sexual services to Daly was an inseparable part of the consideration for the 'cohabitators agreement,' and indeed was the predominant consideration." "There is," the court said, "no severable portion of the 'cohabitators agreement' supported by independent consideration."¹²¹

The solution came in a still later case, *Whorton v. Dillingham*.¹²² The complaint in that case listed *mutual* sexual promises—that the plaintiff promised to be the defendant's "lover" and that the defendant promised to be the plaintiff's "lover." The court held the complaint stated a cause of action. In a key passage, the court stated that "by itemizing the mutual promises to engage in sexual activity, [the plaintiff] has not precluded the trier of fact from finding those promises are the consideration for each other and independent of the bargained for consideration for [the plaintiff's] employment."¹²³

It seems to me that the *Whorton* analysis suggests a responsible way around the problem in a jurisdiction forced to work within the "express and inseparable" distinction. Even if sexual intimacy is listed in the complaint on only one side, surely the way to handle these cases is to presume that the sexual component of a cohabitation is always separable from the other parts of the contract, on the ground—to be blunt—that the consideration for sex is sex.¹²⁴

B. Rights of Domestic Partners Without a Provable Contract

What if the plaintiff entered upon a cohabitation arrangement without contractual protection? In *Marvin*, Michelle did allege an oral contract, but it turned out that she was unable to prove it. Should these plaintiffs—those who never allege or cannot prove a contract—ever receive relief? Or, should the law say that they knew what they were getting into, took the risk that it would not work out, and cannot now cry foul when they lost the gamble and the arrangement later fell apart? After all, they already got room and board,

121. *Id.* at 134.

122. 248 Cal. Rptr. 405 (1988).

123. *Id.* at 409-10.

124. I do not want to be understood as saying that the idea that the consideration for sex is sex is a realistic way of analyzing the complicated emotional, financial, and physical relationships that exist in a domestic partnership, anymore than I would suggest that this idea is a realistic way of analyzing those relationships in a marriage. My point is merely that, in a jurisdiction forced to work under the "express and inseparable" principle, this is a convenient, though fictitious, way of dealing with the problem.

probably some gifts, and, in general, probably lived a higher life style than they could have afforded on their own. Is that not all they deserve?

This is the most important question in this developing area. The courts in a few jurisdictions have closed the door to plaintiffs without an express contract¹²⁵ and at least one legislature has closed the door to plaintiffs without an express *written* contract.¹²⁶ The advantage of such a bright-line test, especially the one that insists on an express *written* contract, is that it introduces an element of efficiency into the law similar to the efficiency accruing from grounding spousal rights on status.¹²⁷ The domestic partner with a contract can claim the contractual rights without having to prove anything about the underlying details or commitment of the relationship. Just as the marriage certificate qualifies the spouse for what the law allows, the written contract qualifies the domestic partner-plaintiff for what the contract allows.

The disadvantage is that plaintiffs with just claims are shut out. This category includes plaintiffs who are in a "subordinate" position to the defendant in terms of bargaining power, and hence are unable to obtain contractual protection. More importantly, perhaps, this category also includes plaintiffs who are unsophisticated in the ways of the law—the underclass, for want of a better term.

To its credit, the court in the *Marvin* case thought that there would be cases that warranted relief even without a contract, and however one feels about the morality of these arrangements, there are cases in which the plaintiff's claim seems undeniably just. In seeking to find a way of analyzing

125. See, e.g., *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Boland v. Catalano*, 521 A.2d 142 (Conn. 1987); *Aehagma v. Aehagma*, 797 P.2d 74 (Haw. Ct. App. 1990); *Estate of Alexander*, 445 S.2d 836 (Miss. 1984); *Dominguez v. Cruz*, 617 P.2d 1322 (N.M. Ct. App. 1980); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980). The *Alexander* court held that if a remedy is to be given to a surviving cohabitant in the absence of an express contract, "the Legislature should provide the remedy." See also *Carnes v. Sheldon*, 311 N.W.2d 747 (Mich. Ct. App. 1981) (although prior Michigan cases have held that express contracts are enforceable to the extent they are based on independent consideration, and have enforced contracts implied in fact for wages or for the value of commercial services, the court in the instant case was "unwilling to extend equitable principles to the extent plaintiff would have us do, since recovery based on principles of contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legislature. . . . [J]udicial restraint requires that the Legislature, rather than the judiciary, is the appropriate forum for addressing the question raised by plaintiff. We believe a contrary ruling would contravene the public policy of this state 'disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.'").

126. See *supra* note 114.

127. See *supra* text accompanying note 103.

this problem, the court in *Marvin* used an interesting phrase. The court spoke, and spoke repeatedly, of enforcing the "reasonable expectations of the parties." "The courts may inquire into the conduct of the parties¹²⁸ to determine whether that *conduct* demonstrates an *implied* contract or implied agreement of partnership or joint venture, or some other *tacit* understanding between the parties," the court said.

In speaking of the "reasonable expectations of the *parties*"—plural—the court was probably knowingly engaging in a fiction. Few could doubt that the parties in the *Marvin* case did not enter or continue the arrangement with the same expectations. Some interesting empirical research has shown that different expectations are standard. The study found:

In 39 percent of the cases for which we have couple data, one party believes they will marry and the other does not! This difference of perception is surely a factor in the higher instability of these unions. Another 11 percent agree that they will not get married, making just about half of all cohabiting couples where there is disagreement about marriage or no plans to marry. Twenty-nine percent agree that they have definite plans to marry, and in another 20 percent of the cases one partner has definite plans to marry, while the other thinks they will marry but does not have definite plans to do so.¹²⁹

128. According to Professor Glendon, the reference to an inquiry into the conduct of the parties raised "the prospect of litigation in which the private lives of the parties can be explored in detail [and] has led already to the settlement out of court of a number of suits by alleged same-sex lovers or clandestine playmates of well-known people." GLENDON, *supra* note 44, at 279.

129. Larry L. Bumpass et al., *supra* note 104, at 14. See also Ronald R. Rindfuss & Audrey VandeHenvel, *Cohabitation: Precursor to Marriage or an Alternative to Being Single*, 16 POPULATION & DEV. REV. 703, 721 (1990) (empirical study finding that "cohabitators are substantially more similar [in their attitudes toward matters such as marriage and childbearing plans] to the singles than to the married"). A later study, however, found "a fairly high level of consensus" about marriage plans among heterosexual cohabitators who were age 35 and younger:

Seventy percent of those who report that they have definite plans to marry their partner live with a partner who reports that they have definite plans to marry them. An additional 14 percent had partners who thought that they would marry them. Only about 6 percent had partners who did not expect to marry them or who did not know whether or not they would marry.

James A. Sweet & Larry L. Bumpass, *Young Adults' View of Marriage, Cohabitation, and Family*, Working Paper No. 33, at 5 (Nat'l Survey of Families and Households, 1990).

To be sure, this study reports on *marriage* expectations in *shorter-term* cohabitations, and the *Marvin* court's emphasis was on a different type of expectation—the expectation that there will be "profit-sharing." To be sure, also, our emphasis is on the longer-term, marriage-like cohabitations, those that are the exception overall but tend to accumulate in the population. In any event, Lee Marvin and Michelle Triola, it would probably be safe to speculate, did not share the same expectations, not even when entering into or during the happy periods of their arrangement. Michelle probably hoped and maybe even expected that Lee would eventually marry her or, failing that, that he would "do right" by her financially. Whether Lee ever intended to do either is unclear. He certainly determined never to give her a dime shortly after they broke up.

So, what do we make of the court's emphasis on "the reasonable expectations of the parties"? The court could be saying one of two things. One is that there should be inquiry into whether the defendant's behavior reasonably led the plaintiff to think that he had the same expectations she did, *i.e.*, whether the defendant led her on. The other, more significant possibility is that the court is saying that it will attribute or impute "reasonable" expectations even when they are fictional regarding one of them.

Although this latter idea came to nothing in the *Marvin* case itself,¹³⁰ some courts, in later cases, have begun to apply this idea. Case authority is beginning to appear in which marriage-like cohabitation relationships are held to have the same force and effect as a legal marriage.¹³¹ Many if not all of these cases involve relationships that would be common-law marriages¹³² but

130. On remand, Michelle failed to prove the existence of an express or implied contract, but the trial court awarded her \$104,000 for rehabilitation on the ground of an unspecified equitable theory. On appeal, the judgment granting this award was reversed for want of a "recognized underlying obligation in law or in equity." *Marvin v. Marvin*, 176 Cal. Rptr. 555 (1981). See also *Taylor v. Polackwich*, 194 Cal. Rptr. 8 (1983) ("rehabilitative award" reversed on appeal).

131. For examples of cases providing for equitable division of property acquired while the couple cohabited before marrying or acquired while the couple cohabited after having divorced each other, see *Eaton v. Johnson*, 10 Fam. L. Rep. (BNA) 1094 (Kan. Ct. App. 1983); *Pickens v. Pickens*, 490 So.2d 872 (Miss. 1986); *Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984).

132. The requirements necessary to establish a common-law marriage vary somewhat from state to state, but have been summarized as follows:

The jurisdictions which recognize common law marriages all require that the parties presently agree to enter into the relationship of husband and wife. Most jurisdictions also require cohabitation, or actually and openly living together as husband and wife. . . . Some jurisdictions further require that the parties hold themselves out to the world as husband and wife, and

for the abolition of that doctrine.¹³³ Two examples will suffice.¹³⁴ The first is *Goode v. Goode*,¹³⁵ a recent West Virginia case. Carl and Martha Goode separated after having lived together for twenty-eight years. Although

acquire a reputation as a married couple. However, other jurisdictions hold that cohabitation and reputation are not requirements of a valid common law marriage, but solely matters of evidence.

Under all of these definitions, evidence that the parties have stated "We're not married, we're just living together" will destroy the claim of a common law marriage.

Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Nontraditional Family*, 24 IDAHO L. REV. 353, 361 (1987).

133. Most states have abolished common-law marriage by statute. See, e.g., MICH. COMP. LAWS ANN. § 551.2 (West 1988). Only thirteen states (Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas) and the District of Columbia still recognize the concept. HOMER HARRISON CLARK, *LAW OF DOMESTIC RELATIONS* § 2.4 (2d ed. 1987).

Negative judicial and legislative reaction to the concept of common-law marriage grew during the late nineteenth century. One criticism of the concept was that the informality of common-law marriages makes them highly vulnerable to fraud and perjury. More prominent was the argument that common-law marriage undermined the sanctity of marriage. See, e.g., *Sorenson v. Sorenson*, 100 N.W. 930, 932 (Neb. 1904). See generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

In some states where common-law marriage has been abolished, courts have applied a de facto common-law marriage doctrine to couples who lived together in a common-law marriage state. In *Kellard v. Kellard*, 13 Fam. L. Rep. (BNA) 1490 (N.Y. Sup. Ct. 1987), a New York man and woman, unmarried but cohabiting with one another, took an automobile trip to Disney World in 1978. During the trip, they stayed overnight in a motel in South Carolina where they registered as husband and wife, and engaged in sexual intercourse. They also stayed for two nights in a motel in Georgia. Some years later, in defense to a divorce suit filed in New York by the woman, the man claimed that no divorce was necessary because he was not married to the plaintiff. A New York court rejected his defense, holding that the couple's behavior enroute to Disney World satisfied the common-law marriage requirements of South Carolina and Georgia. This, along with the lengthy history of the couple's relationship, led the court to recognize them as married. See also Gary Taylor, *Increased Mobility Adds to Common Law Claims*, NAT'L L.J., Aug. 14, 1989, at 24.

134. Other post-*Marvin* cases have asserted claims based on nonfamily doctrines, such as express contract, contract implied in fact, contract implied in law, quantum meruit, and constructive trust. See, e.g., *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). Decisions in many of these cases are ambiguous as to whether the court based recovery on a contract implied in fact or on unjust enrichment grounds.

135. 396 S.E.2d 430 (W. Va. 1990).

the couple had never formally married, they had constantly held themselves out to the public as husband and wife. They had four children. Martha, age 47, filed a divorce action against Carl, age 61, seeking an equitable division of the property they had acquired during their 28-year period of cohabitation. Although West Virginia is not a common-law marriage state, the court held that Martha could recover, saying:

[W]e hold that a court may order a division of property acquired by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife. Such order may be based upon principles of contract, either express or implied, or upon a constructive trust. Factors to be considered in ordering such a division of property may include: the purpose, duration, and stability of the relationship and the expectations of the parties. Provided, however, that if either the man or woman is validly married to another person during the period of cohabitation, the property rights of the spouse and support rights of the children of such man or woman shall not in any way be adversely affected by such division of property.¹³⁶ The expectations of the parties under these circumstances would be equitable treatment by the other party in exchange for engaging in such a cohabiting relationship.

My second example is a case that goes even farther and allows an unmarried plaintiff to utilize the divorce laws directly. That case is a Washington case, *Warden v. Warden*.¹³⁷ Charles Warden and Denise Boursier began living together in 1963, holding themselves out as husband and wife. They had two children. In 1972, Charles moved to California and formally married another woman. After learning of this, Denise brought suit under the divorce laws for child support and an equitable division of property, which the trial court awarded. Charles appealed that part of the judgment

136. Under the facts of this case, the parties lived together for an extended period of time, considered themselves as husband and wife, and, in fact, pooled their resources to include taking property under three joint deeds. Therefore, in this case, the equities are more easily determined than in a relationship between two parties which was for a shorter duration, or where the parties did not consider themselves to be husband and wife, or where the parties did not pool their resources. Cases in other jurisdictions have noted that "[e]ach case should be assessed on its own merits with consideration given to the purpose, duration and stability of the relationship and the expectations of the parties." *Hay v. Hay*, 678 P.2d 672, 674 (1984). [Footnote by the court.]

137. 676 P.2d 1037 (Wash. Ct. App. 1984).

decreeing a division of the property. Although Washington is not a common-law marriage state, the Washington Court of Appeals affirmed, saying:

We believe the time has come for the provision of [the Washington statute providing for equitable division of property upon dissolution of a marriage] to govern the disposition of the property acquired by a man and a woman who have lived together and established a relationship which is tantamount to a marital family except for a legal marriage.

The trial judge here properly treated Denise and Charles as a marital family and correctly considered the length and purpose of their relationship, the two children, the contributions of the parties, and the future prospects of each. He correctly assumed that both Denise and Charles contributed to the acquisition of the property and divided it in a manner which was "just and equitable after considering all relevant factors."¹³⁸

If the plaintiff in this case could utilize the divorce laws to gain a share of the "marital" property, surely a similarly situated plaintiff could gain an intestate share of the defendant's estate and, since Washington is a community-property state, claim her half of the "community property."

If the law begins to grant extra-contractual rights to disappointed domestic partners, does this mean that the law is edging toward granting rights based on "status"? The answer appears to be both Yes and No. To the extent that rights are granted without having been explicitly bargained for, yes it seems that rights are being granted on the basis of status. Unlike marital status or contractual status, however, each litigated cohabitation must be probed in order to classify it as marriage-like or nonmarriage-like to determine whether relief is warranted. Each plaintiff must prove that the underlying nature of his or her relationship with the defendant warrants recovery, that the relationship fits within the criteria of a marriage-like cohabitation. The extract quoted from the *Warden* opinion gives some idea of what must be proved. Another definition comes from the recent New York case of *Braschi v. Stahl Associates Co.*,¹³⁹ a case that involved an analogous question under the New York rent control laws: There must be, the court said:

an objective examination of the relationship of the parties[, including] the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in

138. *Id.* at 1039-40. *Contra*, *Crowe v. De Gioia*, 495 A.2d 889, 897-98 (N.J. Super. Ct. App. Div. 1985), *aff'd*, 505 A.2d 591 (N.J. 1986) (rejecting plaintiff's claim for equitable distribution of defendant's property).

139. 543 N.E.2d 49 (N.Y. 1989).

which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. . . . These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.¹⁴⁰

C. *A Proposed Intestacy Statute, in Working Draft*

The question these cases leave us with is this: Are we obliged to continue resolving these issues inefficiently, on a case-by-case basis? Or, can we minimize case-by-case adjudication by opening up more efficient, bright-line tests into which most plaintiffs with just claims could fit rather automatically. To begin to come to grips with this problem, I propose to submit for consideration an intestacy statute as a starting point for discussion. Beginning with an intestacy statute is, in a sense, the easiest place to start, for an intestacy statute can be based on imputed intent to make a *voluntary* transfer, rather than on a quasi-marital sharing or return of contribution theory, on which an elective-share provision or *involuntary* transfer system would have to be based and which would be the death-time counterpart of the quasi-divorce cases discussed above—*Marvin*, *Goode*, and *Warden*.

Here is the draft intestacy statute that I would like to put forward for debate.¹⁴¹

140. *Id.* at 55. See also Mary Patricia Truethart, *Adopting a More Realistic Definition of "Family,"* 26 GONZAGA L. REV. 91 (1990/91).

141. In fashioning this statute, I have drawn upon a similar proposal put forward by the Queensland Law Reform Commission. In relevant part, the proposed Queensland intestacy statute provides:

Meaning of "spouse"

35A.(1) An intestate's "spouse" is the intestate's married spouse or de facto partner.

. . . .

Meaning of "de facto partner"

35C. An intestate's "de facto partner" is a person, whether or not of the same gender as the intestate, who at the intestate's death—

- (a) lived with the intestate as a member of a couple on a genuine domestic basis and either—
 - (i) in the 6 years before the intestate's death, lived with the intestate as a member of a couple on a genuine domestic basis for a period of, or periods totally, at least 5 years; or

SECTION [INSERT APPROPRIATE NUMBER]. INTESTATE SHARE OF DE FACTO PARTNER.¹⁴²

(a) [Amount.] If an unmarried decedent dies without a valid will and leaves a surviving de facto partner, the decedent's surviving de facto partner is entitled to:

(1) the first [\$50,000], plus one-half of any balance of the intestate estate, if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving de facto partner and there is no other descendant of the surviving de facto partner who survives the decedent;

(2) one-half of the intestate estate, in cases not covered by paragraph (1).

(b) [Requirements.] To qualify as the decedent's de facto partner for purposes of this section, the individual must not have been prohibited from marrying the decedent under the law of this state by reason of a blood relationship to the decedent and must, at the decedent's death, have been unmarried and regularly living in the same household with the decedent in a marriage-like relationship.

(c) [Factors.] Among the factors to be considered in determining whether a relationship is marriage-like are the following:

(1) the purpose, duration, constancy, and exclusivity of the relationship;

(2) the degree to which the parties pooled their financial resources, such as by maintaining joint checking or

(ii) is the parent of a child of the intestate who is less than 18 years old; but

(b) was not legally married to the intestate.

QUEENSLAND LAW REFORM COMMISSION, REP. NO. 42, INTESTACY RULES ch. 9 at 10-11 (June 1993) [hereinafter QUEENSLAND INTESTACY REPORT]. To a certain extent, I have also drawn upon Sweden's recent Law on Cohabitants' Mutual Home, as described in Matthew Fawcett, *Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants*, 24 FAM. L.Q. 179 (1990).

142. I have borrowed the term "de facto partner" from the Queensland proposal. See QUEENSLAND INTESTACY REPORT, *supra* note 141, § 2.2.1. The Swedish statute uses the term "sambor." See Fawcett, *supra* note 141, at 179. Among other terms that might be used are "de facto spouse" or "quasi spouse." I have deliberately chosen not to use the term "domestic partner" because that term is used by various organizations that have established domestic-partnership registries for their unmarried employees or students who wish to gain certain benefits for their partners, and registration does not, under the above statute, automatically qualify the survivor for an intestate share.

other types of accounts, sharing a mortgage or lease on the household in which they lived or on other property, titling the household in which they lived or other property in joint tenancy, or naming the other as primary beneficiary of life insurance or employee benefit plans;

(3) the procreation or adoption of children and the degree of mutual care and support given them;

(4) whether the couple went through a marriage ceremony; and

(5) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis, as exhibited by their acknowledging mutual rights, duties, and obligations toward one another.

(d) [Presumption.] An individual's relationship with the decedent is presumed to be marriage-like if:

(1) during the [six] year period next preceding the decedent's death, the decedent and the individual lived together for periods totalling at least [five] years;

(2) the decedent and the individual registered as domestic partners with and under procedures established by an organization and neither partner executed a document terminating or purporting to terminate the registration; or

(3) the individual is the parent of a child of the decedent who, at the decedent's death, was regularly living in the same household with the decedent and was younger than 18 years of age.

This statute does not reinstate common-law marriage. It does not treat de facto partners as married for all purposes. Nor does it even treat them as married for all purposes of the probate code. The statute does not extend beyond intestacy, and thus does not grant a de facto partner a claim to an elective share, to the probate exemptions and allowances, to override a will executed prior to the institution of the relationship, or to be appointed the decedent's personal representative. Moreover, in recognition of the competing claims of the decedent's blood or adoptive relatives, and to some extent to maintain the incentive to enter into a formal marriage, the statute grants a surviving de facto partner a substantially smaller intestate share than a spouse would take under the UPC.¹⁴³ Under this statute, a decedent who wishes to

143. See UPC § 2-102 (1990). The Queensland intestacy proposal grants the de facto partner the same share a spouse would take. See QUEENSLAND INTESTACY REPORT, *supra* note 141, § 2.3.

give a larger share to his or her partner must make a will or make arrangements to benefit the partner by nonprobate transfer. Whether or not these are the proper calls is a serious topic for debate,¹⁴⁴ of course, and I do not want to be understood as opposed to a broader set of rights for de facto partners. It is just that, in making this initial proposal, my intention is to err on the side of caution.

Entitlement under the statute depends on satisfying four requirements. These requirements are that the decedent and the individual claiming to be the decedent's de facto partner: (1) must not have been related by blood in a manner that would have precluded them from marrying each other under state law; (2) must, at the decedent's death, have been unmarried; (3) must then have been regularly living together in the same household¹⁴⁵; and (4) must then have been in a relationship that was marriage-like. I would not feel comfortable attributing to the decedent an intention to benefit the claimant unless all these requirements were satisfied.

By focusing on matters that are susceptible to objective proof, the first three requirements constitute bright-line tests that exclude certain categories of cases.¹⁴⁶ Thus, for example, in the *Goode* and *Warden* cases, *supra*, had

Because this statute applies to same-sex relationships as well as to opposite-sex relationships, *see infra* note 148, consideration should be given to granting a larger intestate share, perhaps the same share a spouse would take, to a surviving de facto partner who, because of gender, was prohibited by law from marrying the decedent.

144. Relevant to whether the de facto partner should be on the list or even at the top of the list to be appointed the decedent's personal representative under, for example, UPC § 3-203, is the fact that § 5(c) of the recently promulgated Uniform Health-Care Decisions Act provides that "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as surrogate" to make health-care decisions for a patient, if none of the relatives specified in an earlier subsection is eligible to act.

145. Consideration should be given to providing, either in the statute or in commentary, that the requirement that the decedent and the claimant were regularly living together in the same household can be satisfied in cases of job-related or involuntary separation, such as where one or the other was on a military mission, was in prison, was hospitalized, or was in a nursing home.

146. Apart from providing an objective, bright-line test of exclusion, the requirement that the decedent be unmarried has the additional benefit of avoiding difficult questions of allocating property between a spouse and an individual claiming to be a de facto partner in cases in which the decedent is married to someone else. *Cf.* *Thomas v. LaRosa*, 400 S.E.2d 809 (W. Va. 1990) (post-*Goode* decision holding that, because the defendant was married to another woman during his cohabitation with the plaintiff, alleged oral contract to provide plaintiff with financial security and educate her children was not enforceable).

By not limiting its proposal to such cases, the Queensland intestacy proposal contains several additional sections devoted to deciding which of the two competing

the defendants died intestate after they and the plaintiffs separated, neither plaintiff would have had a claim to an intestate share under this statute. There would be no need to delve into the question of whether the couples's relationships were marriage-like when they were living together, for the defendants's leaving the household unmistakably manifested their intentions not to make any *voluntary* transfers to the plaintiffs.¹⁴⁷

The above, bright-line tests—that the decedent and the claimant must not have been precluded from marrying each other under state law by reason of a blood relationship, must have been unmarried at the decedent's death, and must then have been regularly living together in the same household—are peculiarly exclusionary. Most bright-line tests serve both to exclude and include. The statute does not, however, contain this type of bright-line test. For claimants who are not excluded by the first three requirements, the test of inclusion/exclusion, contained in the fourth requirement, is that, at the decedent's death, the relationship between the decedent and the claimant must be classified as "marriage-like."¹⁴⁸ This requirement, unlike the other three,

claimants, the decedent's spouse or de facto partner, takes in preference to the other. The basic rule proposed is that the spouse takes preference unless the decedent has not lived with the spouse during the five-year period next preceding the decedent's death. See QUEENSLAND INTESTACY REPORT, *supra* note 141, § 2.3.3.

147. Under most intestacy laws, if *spouses* separate prior to the decedent's death, the survivor still takes an intestate share. See *supra* note 103 and accompanying text. The reason is that marriage creates a legal relationship that is terminated by divorce, not by separation. The most public way by which de facto partners typically manifest the creation of their relationship is by moving into the same household and manifest its termination by moving out.

148. Although under current law, partners of the same sex are unable to marry one another, see *supra* note 106 and accompanying text, the term "marriage-like" is not intended to exclude same-sex relationships. The Swedish Law on Cohabitants' Mutual Home, which uses the term "marriage-like," has been extended to partners of the same sex. See Fawcett, *supra* note 141, at 185. The comparable provision in the Queensland intestacy proposal, which also covers same-sex as well as opposite-sex relationships, requires that the claimant "lived with the intestate as a member of a couple on a genuine domestic basis." Although the term "genuine domestic basis" is not defined in the proposed statute, the report cites case-law making it clear that the approach is one of balancing a variety of factors not dissimilar from those listed in subsection (c) of the above proposed statute. See QUEENSLAND INTESTACY REPORT, *supra* note 141, § 2.3.1.

The coverage of same-sex as well as opposite-sex relationships in the above statute is consistent with popular opinion and likely to be less controversial than authorizing same-sex marriages. According to a Newsweek poll conducted in 1992, 70% of the respondents favored inheritance rights for gay spouses, with only 25% opposed. In contrast, 58% opposed legally sanctioning gay marriages, while 35% favored it. See Bill Turque, *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 35, 37.

requires a balancing of all relevant factors to determine the nature of the parties' relationship. I have come to believe that the use of such a test is unavoidable if one wishes to prevent the statute from being intolerably over- and under-inclusive.

Consequently, the above draft statute adopts a balancing test to determine whether the parties' relationship was sufficiently marriage-like to justify attributing an intent to the intestate decedent to benefit the claimant. To assist the court in arriving at an appropriate conclusion, and to help resolve easier cases with a minimum of litigation, the statute employs two techniques. Subsection (c) lists a variety of factors that are to be considered and subsection (d) lists discrete situations that raise a presumption of a marriage-like relationship. If, under subsection (d), the relationship is presumed to be marriage-like, the burden to prove otherwise shifts to the individuals who would otherwise take the decedent's intestate estate.

The factors listed in subsection (c) are derived from the case law on the question. Many of the factors relate to objective data, and would be subject to clear proof one way or the other. In determining whether a relationship is marriage-like, the totality of the parties' relationship is to be considered. Although subsection (c) lists a number of factors to be considered, the list is not exhaustive and no single factor is dispositive. Relevant to the purpose, constancy, and exclusivity of the relationship are whether or not a sexual relationship existed and the extent to which the relationship, during cohabitation, was monogamous.¹⁴⁹

Subsection (d) is designed to reduce litigation by presuming that a relationship is marriage-like in three discrete circumstances. All of these circumstances relate to objective data, and should be subject to clear proof one way or the other. The first of the three concerns the length of time the parties lived together in the same household. If, "during the [six] year period next preceding the decedent's death, the decedent and the individual lived together for periods totalling at least [five] years," their relationship is presumed to be

By making a same- or opposite-sex de facto partner an heir, and hence a natural object of the decedent's bounty, the above statute would likely deter actions contesting the validity of a decedent's will that devises property to his or her partner and reduce the success rate of those actions that are brought. See *supra* note 110.

149. Under most intestacy laws, if one or both spouses are unfaithful, the survivor still takes an intestate share. See *supra* note 103 and accompanying text. When the parties are not married, however, the behavior of the parties forms the basis of the relationship, and such behavior shows a weakened commitment to the relationship. This is not to say that unfaithfulness during cohabitation precludes a finding that the relationship was marriage-like. The degree to which one or both parties were unfaithful, when it occurred, and so on are just factors to be considered in the overall balance of factors the court should consider in arriving at its conclusion. To be found marriage-like, a relationship need not be like an ideal or perfect marriage.

marriage-like. As noted above, demographic studies show that only about ten percent of unmarried, cohabiting couples remain together after five years without either marrying or breaking up.¹⁵⁰ To allow the parties some freedom for interruption, a margin of error is introduced by allowing the presumption to arise if they lived together for periods totaling five years during the six-year period next preceding the decedent's death rather than requiring an uninterrupted five-year period.¹⁵¹ A presumption also arises if the decedent and the individual registered as domestic partners with and under procedures established by an organization¹⁵² and neither partner executed a document terminating or purporting to terminate the registration.¹⁵³ Finally, a presumption arises if the individual is the parent of a child of the decedent who, at the decedent's death, was regularly living in the same household with the decedent and the claimant and was younger than eighteen years of age.¹⁵⁴ It would probably be appropriate for the comment to state that these circumstances are cumulative, so that if two of the circumstances apply, the

150. See *supra* text accompanying notes 105-06. The Queensland intestacy proposal uses a 5-or-more-year period as one its alternative benchmark requirements for a de facto partnership. See QUEENSLAND INTESTACY REPORT, *supra* note 141, § 2.3.2. Sweden's Law on Cohabitants' Mutual Home makes a 5-or-more-year period of cohabitation strong evidence of a fully matured relationship. See Fawcett, *supra* note 141, at 186.

151. This approach is borrowed from the Queensland intestacy proposal. See QUEENSLAND INTESTACY REPORT, *supra* note 141, § 2.3.2.

152. The term "organization" is defined in UPC § 1-201(32) (1990) as meaning "a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity." Ordinances in a number of municipalities and programs in a number of corporations and educational institutions have set up domestic partnership registries. Under some registry programs, registration confers no benefit whatever, whereas in others it has the effect of extending the same employee benefits, such as health insurance, to the domestic partners of registering employees that are extended to spouses of employees or has the effect of allowing student couples to live in housing previously set aside for married students. See Truethart, *supra* note 140, at 101-05.

153. In states enacting such an intestacy law, any registry program, whether under state or municipal law or under a corporate or other institutional program, should put the registering parties on notice regarding the significance of registering. Moreover, because existing registry programs sometimes caution prospective registering partners that registration does not create inheritance rights, consideration might be given to providing that registration creates a presumption of a marriage-like relationship only if the registration occurred after the effective date of the statute or only if the registration material at the time of registration did not caution that registration creates no inheritance rights.

154. Recall that children are present in a significant fraction of such households. See *supra* note 107 and accompanying text.

presumption is very strong, and if all three apply, the presumption is stronger still.

Should subsection (d) go even farther, and *deem* the relationship to be marriage-like if one or a combination of the three apply? Or, conversely, should subsection (d) be made exclusionary by *precluding* recovery if none of the three applies? Consideration should be given to both of these approaches. I could be easily persuaded to deem the relationship to be marriage-like if all three or perhaps even if two of the three apply. I would be reluctant, however, to deem the relationship to be marriage-like if only one of the three applies, unless it would be the third—that the claimant is the parent of a child of the decedent who, at the decedent's death, was regularly living in the same household with the decedent and the claimant and was younger than eighteen years of age.¹⁵⁵ Either of the other two, standing alone, seems to me to be too imperfect a proxy for automatically treating a relationship as marriage-like. Such an approach runs too great a risk of reaching an inappropriate result in too many cases. A fixed-time rule, for example, could potentially give an intestate share to mere roommates or even in certain cases to foster children or stepchildren.¹⁵⁶ Similarly, registering as domestic partners pursuant to a program of an organization, such as a municipality, corporation, or educational or charitable institution, might, in some cases, merely indicate the decedent's intention to extend or receive benefits paid for by others, rather

155. The Queensland intestacy proposal uses the existence of joint children under 18 as one of its alternative benchmark requirements for a *de facto* partnership, *see* QUEENSLAND INTESTACY PROPOSAL, *supra* note 141, § 2.3.2, and Sweden's Law on Cohabitants' Mutual Home makes the existence of joint children "nearly conclusive evidence of a sambo relation," *see* Fawcett, *supra* note 141, at 185-86.

Under the statute proposed above, the claimant's intestate share would be the first \$50,000 plus one-half of the balance of the intestate estate if the decedent's only children were joint children with the claimant, but only one-half of the intestate estate if the decedent had other children.

156. An intestacy statute in New Hampshire uses a 3-year rule, combined with the requirements that the parties acknowledge each other as husband and wife and that they were generally reputed to be such. The statute provides:

Cohabitation, etc. Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.

N.H. REV. STAT. ANN. § 457:39 (1992).

By combining its fixed-time rule with the requirements that the parties acknowledge each other as husband and wife and that they were generally reputed to be such, this statute eliminates the potential overinclusion. That is, because of the added requirements, there is no danger that mere roommates or foster children or stepchildren would take an intestate share as a spouse.

than to give his or her own property to the claimant.¹⁵⁷ Thus, while I am comfortable in *presuming* that living together for five of the last six years or registering as domestic partners shows that the parties' relationship was marriage-like, I would be uneasy about *precluding* contrary evidence.

I would also be opposed to precluding recovery if none of the three applies. That, it seems to me, would make the statute intolerably underinclusive. For many couples in a marriage-like relationship, registration as domestic partners is unavailable or unacceptable and having children is either impossible or unappealing. For these couples, the fixed-time rule would be the only route available. The fixed-time rule, however, could deprive a surviving partner of a marriage-like relationship just because the decedent died before the required time- period elapsed.¹⁵⁸

D. Other Approaches

Other approaches to make the law more efficient in this area, not mutually exclusive with the above intestacy statute, are also worth considering. One opportunity would arise if domestic-partnership registration legislation should become state law. Extending this type of legislation to the state level is likely to be very controversial,¹⁵⁹ but should it come about, the legislation

157. An answer to the argument that the decedent who used the domestic partnership registration procedures unscrupulously deserves to suffer the consequences is that the claimant was an accomplice in that use and does not deserve to be further rewarded for his or her complicity.

158. The New Hampshire statute, *supra* note 156, appears to make the fixed-time rule exclusionary. Clearly, *the statute* does not grant an intestate share to the survivor of those who did not live together for the required 3 years. This makes the statute potentially underinclusive because it could deprive an intestate share to the surviving partner of a marriage-like relationship that ended in the death of one of the partners before the required 3 years had elapsed.

The Queensland intestacy proposal operates in a similar fashion. In addition to requiring that the couple lived together on a bona fide domestic basis, that statutory proposal requires either the couple to have lived together for 5 of the last 6 years or the claimant to be "the parent of a child of the intestate who is less than 18 years old." See QUEENSLAND INTESTACY REPORT, *supra* note 141, § 2.3.1.

159. See, e.g., *Unmarried-Partners' Rights Test Those of Washington*, N.Y. TIMES, March 10, 1992, at A13, describing a brewing controversy about a domestic-partnership ordinance recently passed by the City Council of the District of Columbia. The ordinance, called the Health Care Benefits Expansion Act, entitles registering District employees to add their domestic partners to their health insurance coverage and provides a tax benefit to private companies that expand health benefits to domestic partners of registering employees.

need not and hopefully will not attribute full marital status to those who register, although that would be a possibility. Another approach would be to provide registrants with an *optional* checkoff system that would serve as a written contract. The registering partners could be given the opportunity to check off whether or not they want to be treated as if they were married for purposes of divorce, intestacy,¹⁶⁰ and elective-share or community law, or to opt for some other system for regulating their financial affairs. The more the law can do to encourage and facilitate written contracts, the more efficient the system will become.

Other creative measures may also come to light to handle this thorny question in the near term and beyond. The area certainly cries out for more efficient solutions than we now have.

V. CONCLUSION

Spousal rights are in a state of transition, but the directional trends seem clear. In intestacy, the lump-sum-plus-a-fraction rather than the straight fractional-share approach for marriages in which there are step children is the only way of granting economic security to a surviving spouse who is beyond working years, as most are, before the estate gets divided between the spouse and children.

In the title-based states, adoption of the community-property system would be ideal. In the meantime, attention should be given to the elective share, for the partnership approach is an idea whose time has surely come. It needs to be implemented and joined with a minimum support element. It also needs to be backed up with an augmented-estate concept, so that evasion by will substitute is curtailed.

Finally, sooner or later, attention needs to be given to the rights of unmarried couples, at least those whose relationship is like a marriage.

Congress reviews and can repeal District of Columbia ordinances. Some members of the House District of Columbia Committee have expressed opposition to the ordinance on the ground that it undermines the traditional family.

160. See *supra* note 153.

Appendix A

Proposed New UPC Section Approved by Joint Editorial Board for the Uniform Probate Code¹

SECTION 1-109. COST OF LIVING ADJUSTMENT OF CERTAIN DOLLAR AMOUNTS.

(a) In this section, "CPI for [a specified calendar year]" means the "Consumer Price Index (Annual Average) for All Urban Consumers (CPI-U): U.S. city average—All items" for the specified calendar year, reported by the U.S. Department of Labor or by a successor federal reporter, or, if that index is discontinued, an equivalent index reported by a federal authority. If no such index is issued, the term means the substitute index chosen by [insert appropriate state agency or court] for the specified calendar year.

[OPTION 1 (SUBSECTIONS (B) AND (C), BELOW) IS FOR
STATES THAT ENACT THE DOLLAR AMOUNTS CONTAINED
IN THE UNIFORM PROBATE CODE AS REVISED IN 1990]

(b) The dollar amounts stated in Sections 2-102, 2-201(b), 2-402, 2-403, 2-405, and 3-1201 shall be increased if the CPI for the calendar year next preceding the year of death exceeds the CPI for calendar year 1989. The amount of each increase, if any, shall be computed by multiplying each dollar amount by the percentage by which the CPI for the calendar year next preceding the year of death exceeds the CPI for calendar year 1989. If any increase produced by this computation is not a multiple of \$100, the increase shall be rounded down to the next lower multiple of \$100, except that, for purposes of Section 2-405, the periodic installment amount shall not be rounded down but shall be the lump sum amount divided by 12.

[(c) Not later than 15 days after [insert date on which Act becomes effective], and not later than January 31 of each succeeding year, the [insert appropriate state agency] shall issue a cumulative list, beginning with the dollar amounts effective for the estates of decedents dying in [insert year in which Act becomes effective], of each dollar amount as increased under this section.]]

1. This section has not yet been submitted to the Uniform Law Conference and thus is not an official part of the Uniform Probate Code.

[OPTION 2 (SUBSECTIONS (B) AND (C), BELOW) IS FOR
STATES THAT ENACT DOLLAR AMOUNTS THAT HAVE
BEEN ADJUSTED FOR INFLATION]

(b) The dollar amounts stated in Sections 2-102, 2-201(b), 2-402, 2-403, 2-405, and 3-1201 apply to the estates of decedents who die in or after [insert year in which Act becomes effective], except that, for the estates of decedents dying after [insert year after the year in which Act becomes effective], these dollar amounts shall be increased if the CPI for the calendar year next preceding the year of death exceeds the CPI for calendar year [insert year next preceding the year in which Act becomes effective]. The amount of each increase, if any, shall be computed by multiplying each dollar amount by the percentage by which the CPI for the calendar year next preceding the year of death exceeds the CPI for the calendar year [insert year next preceding the year in which Act becomes effective]. If any increase produced by this computation is not a multiple of \$100, the increase shall be rounded down to the next lower multiple of \$100, except that, for purposes of Section 2-405, the periodic installment amount shall not be rounded down but shall be the lump sum amount divided by 12.

[(c) Not later than January 31 of [insert year after the year in which Act becomes effective], and of each succeeding year, the [insert appropriate state agency] shall issue a cumulative list, beginning with the dollar amounts effective for the estates of decedents dying in [insert year after the year in which Act becomes effective], of each dollar amount as increased under this section.]]

COMMENT

The dollar amounts stated in Sections 2-102 (Intestate Share of Spouse), 2-201(b) (Supplemental Elective-Share Amount), 2-402 (Homestead Allowance), 2-403 (Exempt Property), 2-405 (Source, Determination, and Documentation), and 3-1201 (Collection of Personal Property by Affidavit) were determined in 1990. In each January issue of *CPI Detailed Report*, the Bureau of Labor Statistics of the U.S. Department of Labor reports the CPI (annual average) for the preceding calendar year. Because of this one-year lag in reporting the CPI, the dollar amounts in these sections were based on the CPI (annual average) for 1989. The CPI for 1989 (annual average) was 124.0 (in 1982-84 dollars). See U.S. Dep't of Labor, Bureau of Labor Statistics, *CPI Detailed Report* Table 1A at 156 (Jan. 1990). In order for these dollar amounts to keep up with inflation, this section provides a cost-of-living adjustment for these dollar amounts.

After subsection (a), which defines the term "CPI [for a specified year]," this section provides enacting states with two options. Which option to be selected depends on whether the state enacts the dollar amounts as stated in

the UPC as revised in 1990 or whether the state adjusts those dollar amounts for inflation. If the state enacts the dollar amounts as stated in the UPC as revised in 1990, the enacting state should adopt Option 1. If the enacting state adjusts these dollar amounts in its initial enactment, the state should adopt Option 2.

Option 1. Option 1 uses the 1989 CPI of 124.0 as the base. Table 1A of the January 1991 issue of the *CPI Detailed Report* reports the CPI for 1990 (annual average) as 130.7 (an increase of 5.4 percent over the CPI for 1989). Table 1A of the January 1992 issue reports the CPI for 1991 (annual average) as 136.2 (an increase of 9.8 percent over the CPI for 1989). Table 1A of the January 1993 issue reports the CPI for 1992 (annual average) as 140.3 (an increase of 16.9 percent over the CPI for 1989). Table 1A of the January 1994 issue reports the CPI for 1993 (annual average) as 145.8 (an increase of 17.6 percent over the CPI for 1989). Thus, subject to the rounding rule stated in the last sentence of subsection (b), the dollar amounts stated in the affected sections would be increased for the estates of decedents dying in 1991 by 5.4 percent, for the estates of decedents dying in 1992 by 9.8 percent, for the estates of decedents dying in 1993 by 16.9 percent, and for the estates of decedents dying in 1994 by 17.6 percent.

Only the dollar amounts stated in the cited sections are to be increased. No dollar amount computed by applying a fraction or percentage stated in these sections is to be increased. For example, under Section 2-102(4), the surviving spouse's intestate share is the first \$100,000 plus one-half of any balance of the intestate estate. Only the \$100,000 amount is to be increased, not the dollar amount produced by applying the fraction of one-half to the balance of the intestate estate nor the dollar amount produced by adding one-half of the balance to \$100,000. Thus, for decedents dying in 1991, the spouse's intestate share under Section 2-102(4) would be the first \$105,400 plus one-half of any balance of the intestate estate. For decedents dying in 1992, the spouse's intestate share under Section 2-102(4) would be the first \$109,800 plus one-half of any balance of the intestate estate. For decedents dying in 1993, the spouse's intestate share under Section 2-102(4) would be the first \$116,900 plus one-half of any balance of the intestate estate. And for decedents dying in 1994, the spouse's intestate share under Section 2-102(4) would be the first \$117,600 plus one-half of any balance of the intestate estate.

Subsection (c) is an optional provision requiring the appropriate state agency, such as the state department of revenue, to issue annually a cumulative list of the dollar amounts as increased under this section. The first cumulative list is to be issued within 15 days after the date on which the Act becomes effective, and the subsequent cumulative lists are to be issued within the first month of each calendar year.

The following table illustrates the form in which these cumulative lists might be presented.

<i>Year of Death</i>	1990	1991	1992	1993	1994
<i>CPI for Prior Year</i>	124.0	130.7	136.2	140.3	145.8
<i>% Increase Over 124.0</i>		5.4%	9.8%	16.9%	17.6%
§ 2-102(2)	\$200,000	210,800	219,600	233,800	235,200
§ 2-102(3)	\$150,000	158,100	164,700	175,300	176,400
§ 2-102(4)	\$100,000	105,400	109,800	116,900	117,600
§ 2-201(b)	\$50,000	52,700	54,900	58,400	58,800
§ 2-402	\$15,000	15,800	16,400	17,500	17,640
§ 2-403	\$10,000	10,500	10,900	11,600	11,760
§ 2-405	\$18,000/ \$1,500	18,900/ 1,575	19,700/ 1,642	21,000/ 1,750	21,100/ 1,758
§ 3-1201	\$5,000	5,200	5,400	5,800	5,800

Option 2. Option 2 uses the CPI for the year prior to enactment as the base. This approach presupposes that the enacting state has adjusted the initial dollar amounts for increases in the CPI between 1989 and the year prior to enactment.

The above table summarizes the initial dollar amounts that should be selected by states enacting this Code in 1990, in 1991, in 1992, in 1993, and in 1994. Thus, a state enacting this Code in 1994 should insert in its enactment of Sections 2-102, 2-201, 2-402, 2-403, 2-405, and 3-1201 the dollar amounts listed under 1994 rather than those listed under 1990. Enactments after 1994 should be adjusted upward according to this procedure.

Appendix B

Elective Share of Surviving Spouse as Reorganized and Clarified by Amendments Approved by the Uniform Law Conference in 1993

SECTION 2-201. DEFINITIONS. In this Part:

(1) As used in sections other than Section 2-205, "decedent's nonprobate transfers to others" means the amounts that are included in the augmented estate under Section 2-205.

(2) "Fractional interest in property held in joint tenancy with the right of survivorship," whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.

(3) "Marriage," as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.

(4) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he [or she] possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

(5) "Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary designation.

(6) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent, whether or not he [or she] then had the capacity to exercise the power, held a power to create a present or future interest in himself [or herself], his [or her] creditors, his [or her] estate, or creditors of his [or her] estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.

(7) "Probate estate" means property that would pass by intestate succession if the decedent died without a valid will.

(8) "Property" includes values subject to a beneficiary designation.

(9) "Right to income" includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.

(10) "Transfer," as it relates to a transfer by or of the decedent, includes (A) an exercise or release of a presently exercisable general power of appointment held by the decedent, (B) a lapse at death of a presently exercisable general power of appointment held by the decedent, and (C) an exercise, release, or lapse of a general power of appointment that the decedent

created in himself [or herself] and of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party.

SECTION 2-202. ELECTIVE SHARE.

(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

IF THE DECEDENT AND THE SPOUSE WERE MARRIED TO EACH OTHER:	THE ELECTIVE-SHARE PERCENTAGE IS:
Less than 1 year	Supplemental Amount Only.
1 year but less than 2 years	3% of the augmented estate.
2 years but less than 3 years	6% of the augmented estate.
3 years but less than 4 years	9% of the augmented estate.
4 years but less than 5 years	12% of the augmented estate.
5 years but less than 6 years	15% of the augmented estate.
6 years but less than 7 years	18% of the augmented estate.
7 years but less than 8 years	21% of the augmented estate.
8 years but less than 9 years	24% of the augmented estate.
9 years but less than 10 years	27% of the augmented estate.
10 years but less than 11 years	30% of the augmented estate.
11 years but less than 12 years	34% of the augmented estate.
12 years but less than 13 years	38% of the augmented estate.
13 years but less than 14 years	42% of the augmented estate.
14 years but less than 15 years	46% of the augmented estate.
15 years or more	50% of the augmented estate.

(b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections 2-207, 2-209(a)(1), and that part of the elective-share amount payable from the decedent's probate estate and nonprobate transfers to others under Section 2-209(b) and (c) is less than [\$50,000], the surviving spouse is entitled to a supplemental elective-share amount equal to [\$50,000], minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in Section 2-209(b) and (c).

(c) [Effect of Election on Statutory Benefits.] If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not

charged against but are in addition to the elective-share and supplemental elective-share amounts.

(d) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

SECTION 2-203. COMPOSITION OF THE AUGMENTED ESTATE. Subject to Section 2-208, the value of the augmented estate, to the extent provided in Sections 2-204, 2-205, 2-206, and 2-207, consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute the decedent's net probate estate, the decedent's nonprobate transfers to others, the decedent's nonprobate transfers to the surviving spouse, and the surviving spouse's property and nonprobate transfers to others.

SECTION 2-204. DECEDENT'S NET PROBATE ESTATE. The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims.

SECTION 2-205. DECEDENT'S NONPROBATE TRANSFERS TO OTHERS. The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under Section 2-204, of any of the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

(i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(iii) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or

for the benefit of any person other than the decedent's estate or surviving spouse.

(iv) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(2) Property transferred in any of the following forms by the decedent during marriage:

(i) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1)(i), (ii), or (iii), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than

the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph, "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(i), "termination" occurs when the power terminated by exercise or release, but not otherwise.

(ii) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under paragraph (1)(iv) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iii) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in either of the two years exceeded \$10,000.

SECTION 2-206. DECEDENT'S NONPROBATE TRANSFERS TO THE SURVIVING SPOUSE. Excluding property passing to the surviving spouse under the federal Social Security system, the value of the augmented estate includes the value of the decedent's nonprobate transfers to the decedent's surviving spouse, which consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(1) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant,

(2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner, and

(3) all other property that would have been included in the augmented estate under Section 2-205(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

SECTION 2-207. SURVIVING SPOUSE'S PROPERTY AND NONPROBATE TRANSFERS TO OTHERS.

(a) [Included Property.] Except to the extent included in the augmented estate under Section 2-204 or 2-206, the value of the augmented estate includes the value of:

(1) property that was owned by the decedent's surviving spouse at the decedent's death, including:

(i) the surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship,

(ii) the surviving spouse's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, and

(iii) property that passed to the surviving spouse by reason of the decedent's death, but not including the spouse's right to homestead allowance, family allowance, exempt property, or payments under the federal Social Security system; and

(2) property that would have been included in the surviving spouse's nonprobate transfers to others, other than the spouse's fractional and ownership interests included under subsection (a)(1)(i) or (ii), had the spouse been the decedent.

(b) [Time of Valuation.] Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of subsection (a)(1)(i) and (ii), the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of subsection (a)(2), proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under Section 2-205(1)(iv) are not valued as if he [or she] were deceased.

(c) [Reduction for Enforceable Claims.] The value of property included under this section is reduced by enforceable claims against the surviving spouse.

SECTION 2-208. EXCLUSIONS, VALUATION, AND OVERLAPPING APPLICATION.

(a) [Exclusions]. The value of any property is excluded from the decedent's nonprobate transfers to others (i) to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property or (ii) if the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse.

(b) [Valuation.] The value of property:

(1) included in the augmented estate under Section 2-205, 2-206, or 2-207 is reduced in each category by enforceable claims against the included property; and

(2) includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system.

(c) [Overlapping Application; No Double Inclusion.] In case of overlapping application to the same property of the paragraphs or subparagraphs of Section 2-205, 2-206, or 2-207, the property is included in the augmented estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value.

SECTION 2-209. SOURCES FROM WHICH ELECTIVE SHARE PAYABLE.

(a) [Elective-Share Amount Only.] In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

(1) amounts included in the augmented estate under Section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206; and

(2) amounts included in the augmented estate under Section 2-207 up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in Section 2-202(a) appropriate to the length of time the spouse and the decedent were married to each other.

(b) [Unsatisfied Balance of Elective-Share Amount; Supplemental Elective-Share Amount.] If, after the application of subsection (a), the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfers to others, other than amounts included under Section 2-205(3)(i) or (iii), are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(c) [Unsatisfied Balance of Elective-Share and Supplemental Elective-Share Amounts.] If, after the application of subsections (a) and (b), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of the remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

SECTION 2-210. PERSONAL LIABILITY OF RECIPIENTS.

(a) Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to him [or her] or to pay the value of the amount for which he [or she] is liable.

(b) If any section or part of any section of this Part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in Section 2-209, to the person who would have been entitled to it were that section or part of that section not preempted.

SECTION 2-211. PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT.

(a) Except as provided in subsection (b), the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse must give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's nonprobate transfers to others are not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's nonprobate transfers to others are not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse may withdraw his [or her] demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under Sections 2-209 and 2-210. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he [or she] would have been under Sections 2-209 and 2-210 had relief been secured against all persons subject to contribution.

(e) An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this State or other jurisdictions.

SECTION 2-212. RIGHT OF ELECTION PERSONAL TO SURVIVING SPOUSE; INCAPACITATED SURVIVING SPOUSE.

(a) [Surviving Spouse Must Be Living at Time of Election.] The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under Section 2-211(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his [or her] conservator, guardian, or agent under the authority of a power of attorney.

(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section 2-209(b) and (c) must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. For purposes of the custodial trust established by this subsection, (i) the electing guardian, conservator, or agent is the custodial trustee, (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust is deemed to have been created by the decedent spouse by written transfer that takes effect at the decedent spouse's death and that directs the custodial trustee to administer the custodial trust as for an incapacitated beneficiary.

(c) [Custodial Trust.] For the purposes of subsection (b), the [Enacting state] Uniform Custodial Trust Act must be applied as if Section 6(b) thereof were repealed and Sections 2(e), 9(b), and 17(a) were amended to read as follows:

(1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order but with regard to other support, income, and property of the beneficiary [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need.

(3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial trust property in the following order: (i) under the residuary clause, if any, of the will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the beneficiary; or (ii) to that predeceased spouse's heirs under Section 2-711 of [this State's] Uniform Probate Code.

[STATES THAT HAVE NOT ADOPTED THE
UNIFORM CUSTODIAL TRUST ACT SHOULD
ADOPT THE FOLLOWING ALTERNATIVE SUBSECTION
(B) AND NOT ADOPT SUBSECTION (B) OR (C) ABOVE]

[(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court must set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section 2-209(b) and (c) and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:

(1) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse [exclusive of]

[and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.

(2) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.

(3) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or (ii) to the predeceased spouse's heirs under Section 2-711.]

SECTION 2-213. WAIVER OF RIGHT TO ELECT AND OF OTHER RIGHTS.

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) he [or she] did not execute the waiver voluntarily; or

(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he [or she]:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him [or her] from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

SECTION 2-214. PROTECTION OF PAYORS AND OTHER THIRD PARTIES.

(a) Although under Section 2-205 a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

(b) A written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under Section 2-211(d), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under Section 2-211(a) or, if filed, the demand for an elective share is withdrawn under Section 2-211(c), the court shall order disbursement to the designated beneficiary. Payments or transfers to the court or deposits made into court discharge the payor or other third party from all claims for amounts so paid or the value of property so transferred or deposited.

(c) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this Part.